John Forbes, a sole proprietorship, d/b/a Rainbow Painting and Decorating *and* Building Trades Organizing Project (BTOP). Cases 28–CA–14772, 28–CA–15061, and 28–CA–15342

March 21, 2000

DECISION AND ORDER

BY CHAIRMAN TRUESDALE AND MEMBERS FOX AND HURTGEN

On March 25, 1999, Administrative Law Judge Gerald A. Wacknov issued the attached decision. The General Counsel filed exceptions and a supporting brief. The Respondent filed an answering brief.[1]

The National Labor Relations Board has delegated its authority in this matter to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[2] and conclusions,[3] except as modified here, and to adopt the recommended Order as modified.

1. The complaint alleged several violations of Section 8(a)(1) of the Act by leadman Stephen Graybeal on January 12, 1998. Employee Steve Jensen had a jobsite conversation with union organizer Brad Larsen on that date. Soon thereafter, according to Jensen's credited testimony, Graybeal asked Jensen what Larsen had said to him. Jensen reported that Larsen had asked him to wear a union T-shirt. Graybeal then asked Jensen, "[Y]ou're not going for that union stuff, are you?" Jensen responded, "Yes." Graybeal then said that "you know, if the company goes union we'll never have any work."

There are no exceptions to the judge's finding that Graybeal acted as the Respondent's agent during this encounter and that he unlawfully interrogated Jensen and engaged in surveillance of employees' union activity. The General Counsel, however, excepts to the judge's finding that Graybeal's concluding comment was "merely a [lawful] statement of opinion by Graybeal that he believed the Respondent's customers would go elsewhere if the Respondent became unionized."

We find merit in the General Counsel's exception. In the context of unlawful interrogation and surveillance, and in the absence of any objective evidence supporting Graybeal's unqualified assertion that unionization would result in the loss of all work, we find that employees would reasonably view Graybeal's statement as a coercive threat of loss of work, in violation of Section 8(a)(1). See *NLRB v. Gissel Packing Co.,* 395 U.S. 575, 618–620 (1969).

2. We also find merit in the General Counsel's exception to the judge's failure to rule on complaint allegations of unlawful threats made by leadman Rick Bennett during a lunchtime conversation with two employees on December 4, 1997. David Valdovinos, one of those employees, testified that Bennett said, "Rainbow should close the company for a week and then reopen with people that are loyal to the company, and open it with a different name." Bennett also said that "everyone wearing t-shirts with the union name should be fired." Valdovinos testified that he had heard Bennett make similar statements on at least two occasions in the 2 weeks prior to this incident. Although the Respondent called Bennett as a witness, Bennett did not testify about this incident.

Based on Valdovinos' uncontroverted testimony, we find that Bennett made threats of reprisals for union activity, including threats of discharge, company closure, and the creation of an alter ego, which would reasonably tend to coerce employees.[4] These threats therefore violated Section 8(a)(1), as alleged in the complaint.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge, as modified below, and orders that the Respondent, John Forbes, a sole proprietorship, d/b/a Rainbow Painting and Decorating, Las Vegas, Nevada, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 1(a).

"(a) Interfering with, restraining, and coercing its employees in violation of Section 8(a)(1) of the Act by interrogating them regarding their union affiliation or union activities, by engaging in surveillance of their union activities, by telling employees that other employees have been laid off because of their union activities, by implying that employees' union activities are considered in the hiring process, by implying that the work of employees will be more closely monitored because they are active on behalf of the Union, by telling employees managers are upset with them for failing to reveal their union affiliation during the hiring process, by changing work rules to forbid all on-the-job talking because of employ-

[1] The Respondent failed to file timely exceptions to the judge's findings and conclusions that it committed several unfair labor practices.

[2] The General Counsel has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products,* 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[3] In light of the judge's uncontested finding that leadmen who committed unfair labor practices were the Respondent's agents, we find no need to reach the issue of whether they were also supervisors under the Act. We further find it unnecessary to pass on the General Counsel's exception to the judge's failure to rule on allegations of unlawful interrogation by Supervisor Armando Montoya. Any additional finding of unlawful interrogation would be cumulative and would not affect the remedy. Finally, we do not rely on the judge's comments in fn. 31 of his decision regarding the absence of certain individuals from the complaint.

[4] As noted above, no exceptions were filed to the judge's finding that the leadmen acted as Respondent's agents.

ees' union activities, by implying employees will lose work if the company goes union, and by threatening employees with discharge, company closure, and the creation of an alter ego because of union activity."

2. Substitute the attached notice for that of the administrative law judge.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

WE WILL NOT interrogate applicants or employees regarding your union activities.

WE WILL NOT engage in surveillance of employees' union activities.

WE WILL NOT tell employees that other employees have been laid off because of their union activities.

WE WILL NOT imply that applicants' union activities are considered in the hiring process.

WE WILL NOT imply that the work of employees will be more closely monitored because they are active on behalf of the Union.

WE WILL NOT tell employees that we are upset with them for failing to reveal their union affiliation during the hiring process.

WE WILL NOT change work rules to forbid all on-the-job talking because of employees' union activities.

WE WILL NOT imply that employees will lose work if the company goes union.

WE WILL NOT threaten you with discharge, company closure, or the creation of an alter ego because of your union activities.

WE WILL NOT in any like or related manner interfere with, restrain or coerce you in the exercise of the rights guaranteed you under Section 7 of the National Labor Relations Act.

JOHN FORBES, A SOLE PROPRIETORSHIP, D/B/A RAINBOW PAINTING AND DECORATING

Nathan Albright, Esq. and *Keith H. Ebenholtz, Esq.,* for the General Counsel.

Gary Branton, Esq. (Kirshman, Harris & Cooper), of Las Vegas, Nevada, for the Respondent.

Chris Sylvester, union representative, of Las Vegas, Nevada, for the Union.

Richard G. McCracken, Esq. (Davis, Cowell & Bowe), of San Francisco, California, for the Union.

DECISION

STATEMENT OF THE CASE

GERALD A. WACKNOV, Administrative Law Judge. Pursuant to notice a hearing in this matter was held before me in Las Vegas, Nevada, on July 21, 22, 23, 24, and September 16, 17, 18, 22, 23, and 24, 1998. The charge in Case 28–CA–14722 was filed on October 30, 1997, by Building Trades Organizing Project (BTOP or the Union). Thereafter, on January 9, 1998, the Regional Director for Region 28 of the National Labor Relations Board (the Board), issued a complaint and notice of hearing alleging violations by John Forbes, a sole proprietorship, d/b/a Rainbow Painting and Decorating (the Respondent) of Section 8(a)(1) and (3) of the National Labor Relations Act (the Act) as amended. On March 12, 1998, the Union filed the charge in Case 28–CA–15061. Thereafter, on April 30, 1998, the Regional Director for Region 28 of the Board issued an order consolidating cases, consolidated complaint and notice of hearing alleging violations by the Respondent of Section 8(a)(1) and (3) of the Act.[1] On July 29, 1998, during a recess in the hearing the Union filed the Charge in Case 28–CA–15342. Thereafter, on August 19, 1998, the Regional Director for Region 28 of the Board issued a complaint and notice of hearing in that case alleging that the Respondent had engaged in additional conduct violative of Section 8(a)(1), (3), and (4) of the Act. On August 19, 1998, the General Counsel filed a motion to consolidate Case 28–CA–15342 with the other cases previously consolidated. This motion was granted. The Respondent, in its various answers to the complaint and consolidated complaint, denies that it has violated the Act as alleged.

The parties were afforded a full opportunity to be heard, to call, examine and cross-examine witnesses, and to introduce relevant evidence. Since the close of the hearing, briefs have been received from counsel for the General Counsel, and counsel for the Respondent. Upon the entire record, and based upon my observation of the witnesses and consideration of the briefs submitted, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent maintains its office and principal place of business in Las Vegas, Nevada, and is engaged in business as a

[1] The consolidated complaint was further amended at the hearing to include additional allegations of Sec. 8(a)(1) of the Act as a result of the Respondent's admitted failure to give certain individuals a *Johnnie's Poultry* warning during its interviews of such individuals in preparation for litigation of this matter.

painting and drywall contractor performing commercial construction. In the course and conduct of its business operations the Respondent annually purchases and receives products, goods, and materials valued in excess of $50,000 from other enterprises located within the State of Nevada, each of which other enterprises receives these products, goods, and materials directly from points outside the State of Nevada; and, during times material, the Respondent has performed services valued in excess of $50,000 for enterprises within the State of Nevada which are directly engaged in interstate commerce. It is admitted and I find that the Respondent is engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

The record evidence shows and I find that at all material times the Union (BTOP), which is comprised of International Brotherhood of Painters and Allied Trades Local Union #159, AFL–CIO, and Southern California-Nevada Regional Council of Carpenters, affiliated with United Brotherhood of Carpenters & Joiners of America, AFL–CIO, has been a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. The Issues

The principal issues raised by the aforementioned pleadings are whether the Respondent has violated Section 8(a)(1), (3), and (4) of the Act, as alleged.

B. The Facts

1. Background; status of leadmen

The Respondent is a commercial contractor engaged in the business of painting, and the installation of drywall and acoustical ceilings. Its owner is John Forbes. Kirk Metz is in charge of the Respondent's day-to-day operations, and is also personnel manager and safety officer. Reporting to Metz are the divisional managers of the Respondent's various divisions: Jeff Nelson (painting), Lee Mullis (framing), Armando Montoya (drywall), Billy Joe English (drywall taping), Robert Curry (wall covering),[2] and the acoustical ceiling tile (ACT) division.[3]

Forbes testified that the Respondent currently had an employee complement of about 65 employees, but this apparently varies according to the workload, and that sometimes as many as 20 or 25 employees may be designated as leadmen. Usually a person is made a leadman when he has been with the Respondent for a period of time and has demonstrated his abilities, and, in addition, is a responsible individual with a good attendance record. It happens quite frequently that a leadman may be placed in charge of a particular job, but thereafter may be assigned to another job where he is simply a worker who works under another leadman.[4]

Leadmen have the authority to direct the workers according to the directions they receive from the divisional managers. While they work with the tools alongside the other employees most of the time, there is a period of time when the leadman tells employees where to work, or what to do on the job, after conferring with the general contractor's superintendent on the job. Leadmen have no authority to hire employees, transfer employees from one job site to another, suspend employees, or lay off or recall employees. These decisions are made by the divisional managers, and are relayed to the leadmen either face to face or by radio/telephone, which all the leadmen carry. Leadmen have no authority to promote employees, discipline employees, reward employees, or grant wage increases. Indeed, according to Forbes, it is possible for a leadman to be making less than a journeyman who is working alongside the leadman. The leadman is considered to be the main worker on the job, and is to ensure that the policies and rules of the employer are followed; if a worker fails or refuses to follow instructions or to work competently, then the leadman is to report this to his divisional manager, who will come to the jobsite and deal with the situation.

Divisional managers usually visit each job on a daily basis to insure that the job is progressing according to schedule and to handle any problems. In addition, divisional managers are in touch with the leadmen by radio/telephone during the workday, and give them instructions and directions. Generally, each craft on the job will have a leadman in charge. Employees fill out their own timecards and the divisional manager collects them at the end of each pay period. The general contractors know who the divisional managers and leads are on a particular job, and may directly contact the divisional managers when they have matters to discuss. Decisions about recalling workers, laying off workers, and assigning workers to other jobs are made by the various divisional managers, in consultation with the job coordinator and estimator. Leadmen do not participate in such decisions.

Divisional Manager Nelson testified that the leadmen do not discipline employees and do not recommend discipline; rather, they merely relate the concerns they may have about an employee. Sometimes the leadman may be present during such discussions with the employee, so that Nelson and Personnel Manager Metz, Nelson's superior, may hear both sides of the story. Regarding recommendations for wage increases, the leadman, after observing the work of a newly hired employee, may tell Nelson that the worker seems to be doing well, and may suggest that the worker be given a raise. Nelson testified that on such occasions he will himself assess the worker's ability and performance, and, if warranted (perhaps 60 percent of the time), will grant the increase.

Nelson testified that on one occasion leadman Stephen Graybeal exceeded his authority by attempting to discharge employee William Shop for repeatedly reporting to work late. Graybeal, in fact, told Shop he was fired. Thereupon, both Shop and Graybeal notified Nelson about the matter. As a result, Shop was warned by Nelson and Metz for his tardiness but was not discharged. Further, Graybeal was given an immediate verbal warning by Forbes, Nelson, and Metz, who told Graybeal that he had exceeded his authority and was not authorized to discharge or discipline anyone. Graybeal confirmed this and testified that he was indeed so reprimanded for his conduct.

[2] Prior to August 1998, there was no wall covering division and wall covering and painting were assigned to the painting divisional manager. Robert Curry, currently the divisional manager for wall covering, was formerly a leadman.

[3] It appears that one of the other divisional managers is also in charge of the acoustical ceiling tile division.

[4] Michael Kiss, a leadman called as a witness by the General Counsel, testified that he has been a leadman for 14 months, and that on occasion he will work on jobs under another leadman; thus, sometimes he acts as a leadman and sometimes he does not, depending upon the situation.

Forbes also testified that he instructed Metz to discipline Graybeal for exceeding his authority. According to Forbes, Graybeal was very apologetic and said that he had merely lost his temper; and further, Graybeal apologized to Shop. Finally, Metz confirmed the foregoing discipline of Graybeal, and testified that Graybeal was told that that he was completely out of line, that he had a serious problem with his anger and with exceeding his authority, and that if he did it again he "would not be working for us any more."

Nelson, as divisional manager over painting and, until August 1998, wall covering, has between 3 and 5 leadmen in his division, and some additional 8 to 16 employees depending upon the workload. Nelson testified that the leadmen run the jobs, make assignment to the workers, oversee anything that happens on the job, make sure that the materials are available, and discuss matters with the general contractor's superintendent. And the leadmen let Nelson know if more men are needed on the job.

While no leadman has any more authority than any other, and the responsibilities of all the leadmen are identical, some leadmen have been given certain perquisites because of special circumstances: One individual is given a monthly stipend to enable him to pay for medical insurance, and apparently two others, who were formerly divisional managers and had a monthly car allowance or company vehicle furnished by the Respondent, have retained the car allowance or vehicle after becoming leadmen. In addition to the leadmen, some regular workers may also carry radio/telephones when they are working alone.

Robert Curry, currently a divisional manager for wall covering, was a leadman at all times material herein. Curry testified that as a leadman in the painting division he worked with the tools of his trade 95 percent of the time, and during the other 5 percent he "walked the job" to make sure that everything was ready for the workers and that that they had the necessary materials. On occasion he may have been called upon to pick up paint or tools for the men.

Rick Bennett, currently a leadman, has worked for the Respondent 1 year and 6 months. He works with the tools of the trade 90 percent of the time. The other 10 percent of the time he does paperwork (compiling a daily log of what is accomplished), and lays out the work and tells the men what to do.

Stephen Graybeal, a leadman, has been employed by the Respondent for 11 years. He described his position as paint foreman, or supervisor, or leadman. He works with the tools of his trade approximately 80 to 85 percent of the time, and spends the rest of the time lining out the work for the men on the job.

It is clear from abundant record evidence that Graybeal is an outspoken individual who freely expresses, often in emphatic language, what is on his mind, infra. Leadman Michael Kiss testified that he and Graybeal were working at a jobsite where there was some union picketing activity, and Graybeal said to Kiss, "It's all [employee] Larry Cline's fault that they're here . . . if Larry Cline don't quit, we're gonna find a reason to get rid of him." On another occasion, after Cline began wearing a union T-shirt on the job, Graybeal said to Kiss, "That Union . . . mother fucker . . . I'm gonna make him spray oil until he gets sick of it." And in May or early June 1998, Grayybeal told Kiss that, "[w]e're gonna fuck with [Brad Larson, a union activist] until he gets laid off." A week or so later after Larson was, in fact, laid off, Graybeal told Kiss, "We finally got rid of that union mother fucker . . . yeah, I seen his face when he came in and got his last paycheck."[5]

2. Forbes' talk to the employees

John Forbes testified that he held an employee meeting on July 29, 1997, and for the most part read from a prepared statement entitled "A Short Note from John R. Forbes." It is alleged in the complaint that Forbes' remarks unlawfully emphasized the futility of union organizational activity. Insofar as the records shows, Forbes, during the course of his short, one-page, speech to the employees stated, inter alia, as follows:

> May it be crystal clear, the owner and management of Rainbow Painting Drywall has absolutely no intentions of ever becoming a union operation.
>
> With 20 years of experience and 20 years of developing open shop clients, we see the option of a union affiliation as almost wasting those last 20 years. In our opinion, it would be the equivalent of starting over.
>
> . . . .
>
> Rainbow Painting has every intention of obeying National Labor Relation and Federal Government Regulations.
>
> I recognize the right of employees to be involved in union organizing activities. I simply do not believe this is good for the company or for the employees. Other people's agendas are involved here, not employees.
>
> . . . .
>
> We need to work at maintaining the unity this company has developed over these last few years. **Strife and fear** are enemies to what we are trying to do here at Rainbow painting. *However, fellow employees are free to express their own opinions concerning this matter one to another.*

Employee Larry Cline testified that about 20 to 30 employees were in attendance at the meeting. Personnel Manager Metz said something about some change in insurance benefits. Then, according to Cline, Forbes read from a paper and quoted something from the Bible and said something to the effect that everyone was aware that there was union activity being conducted on the job and that the Company was not going to go union. Then there was a question and answer session apparently conducted by a representative of Associated General Contractors, an employer organization.

Employee William Power testified that Forbes said that he had been in business for 20 years and had established business relationships with customers on a nonunion basis, and that his customers didn't want the Union; however, it was okay for the employees to talk amongst themselves about what was going on with the Union.

Employee Brad Larson testified that at the meeting, which lasted close to an hour, there was some discussion about insurance for the employees, and how the Company was changing. Forbes, according to Larson, gave a rather lengthy speech, and said that he had been in business for 20 years and was not union "and he really didn't see any reason that he should deal with the unions or sign a contract."

[5] As leadmen are considered to be supervisors, there are no specific complaint allegations regarding these statements by Graybeal to Kiss; they are proffered as evidence of Graybeal's animus toward union adherents.

3. Complaint allegations regarding Larry Cline

Larry Cline was hired as a painter by the Respondent on April 23, 1997. He was interviewed by Kirk Metz. Cline testified that during the interview he was asked about his commercial painting experience, and as they were "just sitting there kind of chatting," Metz asked him if he was in the union or had ever been in the union. Cline said no. Metz said, according to Cline, that "it was okay that he [Metz] had past . . . employees that was in the union and that they had union painters on their jobs." Then he told Cline that he was hired.

In June 1997, Cline was working at the LaQuinta Inn jobsite. He considered his supervisor to be Steve Graybeal. There were about four other painters on the job during that period of time, and about six additional Rainbow employees were engaged in work other than painting. Cline testified that Graybeal lined out the work for the men[6] and told the employees where they were going to work and what they were going to do for the day. Each employee wrote out his own timecard. On Mondays they would give the timecards to Graybeal and Graybeal would give them to Divisional Manager Jeff Nelson. Graybeal, according to Cline, worked with his tools, but not very often, maybe an hour a day.

On June 24, 1997, Cline and Graybeal were working in a room at the LaQuinta Inn jobsite, and Graybeal asked Cline if he had ever been in the union before. Cline asked him if the Company was going union, and Graybeal said no, that they weren't interested in becoming union. Then, explaining, Graybeal asked whether Cline would want to pay $22.50 per hour to someone such as, for example, John Smith, a painter who was generally known to be a marginal worker. Cline answered no, but asked why the Respondent wouldn't be willing to pay Cline $22.50 per hour. Graybeal said that that would come in time. According to Cline, Graybeal did a lot of "yelling and screaming" on the job the whole time Cline was there. On one occasion Graybeal directed Cline to report to a different job.

On July 3, 1997, Graybeal told Cline that the Union was going to picket the LaQuinta job. Cline asked how he knew and Graybeal answered that there was a snitch in the Union. Cline asked who it was and Graybeal said it was Bill Power. A few days later, according to Cline, the two had a similar conversation.

By letter dated July 23, 1997, the Union advised the Respondent that its "employees are engaged in protected concerted activity in the form of organizing their co-workers at Rainbow Painting and Drywall." The letter goes on to identify three employees as part of the Union's organizing committee; namely, William Power, lead committee member, Larry Cline, and Kevin Reidebach, and states that "we will pursue all legal means to ensure that these workers rights are protected and that they are not discriminated against in any way for exercising those rights."

Cline had taken time off on July 16, 17, and 18, and returned to work on July 21 or 22. On July 22, he was told by Graybeal that there was no work for him the following day, and to call Divisional Manager Nelson to find out when work would be available. Cline phoned Nelson on July 23, 24, and 25, and on July 25 was told to report for work on Monday, July 28. He did so and was sent back to the LaQuinta jobsite. On that day, at about 1:30 p.m., apparently while Cline was working, Reidebach, who had worked with Cline at the LaQuinta job, came out to the site and told Cline that he had been fired.[7] Graybeal, who was nearby, warned them that there would be no talking. However, after Reidebach had left, Cline did speak with other employees on the job that day, testifying that "[b]ut, yeah, if there was somebody there to talk to, I did."

The following morning, July 29, 1997, Cline, who was wearing a union T-shirt for the first time, apparently gave a copy of the Union's foregoing July 23, 1997 letter directly to Graybeal, and then went back to his truck to pick up his tools. Graybeal approached him and said that there would be absolutely no talking like he did the day before, and that if he did any talking Graybeal was going to fire him. He asked Cline if that was fair and if Cline understood. Cline said yes. Graybeal screamed down the hallway to all the workers that "[t]here'd be no talking. There's no talking." So, according to Cline, nobody talked for 2 days because Graybeal was "a screaming and a hollering about no talking for those 2 days." Prior to this time, during Cline's approximately 3 months of employment, there had never been any prohibition of talking on the job while working. Thereafter, Cline wore a union T-shirt on a daily basis.

Cline was working at the LaQuinta Inn job on about August 14, 1997, and, at 9:30 a.m., during his 15-minute morning break, participated in picketing the Respondent at that site. When he went back to work after his break, Graybeal asked him "exactly what it was that I wanted." Cline said that he wanted benefits and more pay. Graybeal responded, "Well, you heard Forbes say that he wasn't going to go union." Cline replied that it wasn't anything personal, and that he was just there trying to organize the Company.

Later that day, just before lunch, Graybeal and Nelson approached him in a stairwell as he was painting. There ensued a 20 or 25 minute conversation. Nelson wanted to know what Cline wanted. Cline again said that he wanted better insurance benefits and more pay, and Nelson replied that to his knowledge no insurance company would provide insurance benefits for employees who had been with an employer for less than 6 months. Cline replied that a union plan would provide benefits after 300 hours, and Nelson said that Cline would be lucky to get 300 hours on union jobs. Nelson went on to tell Cline that Nelson's brother had been in the union for 20 years and that Nelson wasn't sure whether he was working all the time or getting benefits. Nelson said that Rainbow would always have work for him, and that Rainbow had an employee who was 63 years old and was doing just fine. Cline could not recall anything more that was said except for "idle chatter." Graybeal, according to Cline, didn't say anything during this conversation.

Nelson testified that Larry Cline was a painter, and began wearing a union T-shirt at the LaQuinta job sometime in 1997. Cline talked to Nelson about union matters. Cline asked about the policies at Rainbow regarding insurance and raises and things like that, and told Nelson about what he believed the Union could do for him. Nelson answered Cline's questions and explained the Respondent's policies and benefits, and further told Cline that union affiliation was his decision to make and that he could make whatever decision he wanted.

[6] It is not clear whether Graybeal lined out the work of only the painters.

[7] At this time Reidebach was no longer an employee of the Respondent. There is no allegation that Reidebach's discharge was discriminatorily motivated.

Cline was moved around to various jobs under different lead men, including Graybeal, Bob Curry, Rick Bennett, and Tom Beasley[8] Cline testified that he worked steadily and his employment ended on about December 3, 1997, when a union organizer came on the jobsite and offered him a job with a union contractor.

Nelson testified that Cline terminated his employment on December 3, 1997, when some union members showed up on the job one afternoon and Cline just walked off the job with them in the middle of the workday. Because Cline quit without notice he was designated in Respondent's records as ineligible for rehire; this is the Respondent's customary practice. Cline never sought reemployment with the Respondent.

4. Complaint allegations regarding William (Bill) Power

Bill Power was interviewed and hired by Metz on March 31, 1997. During the interview, according to Power, he was not asked any questions that referenced the union. He was told to report to a jobsite where, according to Power, Graybeal was the "supervisor or leadman or foreman." Thereafter, Power worked with various leadmen, including Tom Beesley. Beesley told Power that his brushes and other tools would be provided by the Respondent after Power had been there for a few weeks. On May 6, 1977, during a breaktime conversation, Beesley told Power that his "buddy, Kevin [Reidebach]" was from the Union, and that from time to time the Union would send people out to the Company and that "we know how to deal with that." Power asked him why the Union would do that, and Beesley explained that these people would be paid both by the Union and by the employer and therefore would work for nonunion wages because the difference was made up by the Union. Power told him that that sounded pretty good, and joked that he would like to sign up to do that. Beesley asked him if he had ever been union, and Power said no. Beesley said that most of the guys in their age group had been in the union at one time or another, and that he had been in the union earlier when he was in Alabama. He told Power that Jeff Nelson's brother had been in the union for 20 years and currently had a maintenance job in a casino and didn't think he made much money.

On July 11, 1997, Power wore a union T-shirt to work, and gave a letter to his leadman, Rick Bennett, announcing that he was organizing on behalf of the Union. Also, as noted above, the Union sent a letter to the Respondent dated July 23, 1997, stating that Power was the Union's "Lead Committee Member." During his tenure with the Respondent, Power had been moved around from job to job quite a bit. He testified that during the 3-1/2-month period prior to the end of June he had worked 68 hours of overtime; this would occur when he was asked to stay late or sometimes work on Saturdays.[9] From about the end of June until July 11, 1997, when he identified himself as a union adherent, and up until the time he was laid off on September 5, 1997, according to Power, he only worked 1-1/2 hours of overtime. As far as he knew, other employees were not working overtime during this period; further, he was on "a couple of jobs that I closed up for sure," and there probably was not any need for overtime on those jobs.

Power testified that about 2 weeks after he identified himself as the Union's lead committee member, he was invited by Divisional Manager Nelson to join Nelson and another leadman for lunch; there is no indication in the record that anything was said about the Union on this occasion, or that the three individuals engaged in anything other than a friendly luncheon conversation.

Power testified that sometime during the week of July 21, 1997, leadman Bennett criticized him for not painting the tops of exposed pipes attached to the ceiling, and for leaving light areas or "holidays" that had to be resprayed. He explained to Bennett that he didn't know he was supposed to paint the tops of the pipes, "cause to me it's like, usually, when you paint something up, you paint what you can see." Further, according to Power, the lighting wasn't real good inside the building and, in addition he was not provided with the correct size of paint tip nozzle; therefore, he left some light areas on the rafters or air-conditioning ducts that later had to be repainted or touched up. Bennett told him that "we can't continue to have this quality of work." Then at lunchtime, Jeff Nelson and Bob Curry came out to the site and inspected the work. Curry said, "I know what you're doing to those ceilings up there."

Regarding the paint tip nozzle, Nelson testified that leadman Bennett said he could "make do" with the tips he had until Nelson got out there with some smaller tips. Nelson brought out the correct tips the next day. According to Nelson, a competent journeyman painter should have been able to properly utilize the tips that were available even though they may have not been the best tips for the job. Nelson further testified that Power was admonished, infra, for his work performance generally, and not specifically because of problems that resulted from his not being provided the most appropriate paint tips for the work he was assigned.

Power testified that shortly thereafter, on July 25, 1997, he was called to a meeting at the Respondent's office. Metz and Nelson were present, and Metz did most of the talking. Metz told Power that there had been "numerous complaints" about the quality of his work including complaints by his leadman. Power asked him to be specific as the only problem he knew of was the aforementioned criticism by Bennett. Metz asked Power if he had problems in his personal life. Power replied that he didn't have any personal problems, that he didn't drink, didn't smoke, and led a very boring life. Power also stated that he felt he was being "set up." Metz then told him that the reason he had been brought to the office was to have a "reorientation." Metz said that he wasn't being singled out and that all the employees were going through such a reorientation. Then Power was asked to review and sign a list of field employees' duties.[10]

Metz testified that during the foregoing interview Power appeared very anxious and defensive. Metz told him to relax and assured him that he was not going to be fired, and then stated that he and Nelson wanted to find out if there was anything that could be done to help him improve his performance level as they had received unfavorable reports about his work. And, according to Metz, Nelson told Power that at one point he was very happy with what Power was doing out there, but that his work seemed to be going down hill and Power needed to turn it around. Metz testified that although Power wanted specifics, Metz spoke in generalities, as it was his experience that to get

[8] Tom Beasley is deceased.

[9] However, a summary of Power's overtime hours introduced by the General Counsel shows that from April 4 until June 4, 1997, Power worked only a total of 29.5 hours of overtime.

[10] The record shows that at this time all the field employees were being called to the office for a "reorientation" discussion; there are no complaint allegations relating to this reorientation process.

into a situation of accusations and denials was not advantageous and was, in fact, counterproductive; all Metz was trying to do was to get Power to improve his work performance. Then they discussed the "reorientation" matters that were discussed with each employee. Metz testified that as Power was leaving the room he happened to drop a tape recorder that he had with him. Metz prepared a memorandum to the file to document that meeting with Power. The memo, dated July 25, 1997, states that "William [Power] was given a final warning on the listed concerns, quality of work, and poor production, not being responsible for his job duties."

Rick Vay is a superintendent for L. F. Harris & Associates, a general contractor. Vay testified that at the Beverages and More job, he observed an employee of Rainbow standing around and not doing his job. Vay observed that during periods of from 10 to 30 minutes, at times when Respondent's divisional manager, Nelson, or Respondent's leadman, Bennett, was not present, the individual would just "slack off." Vay explained that as the jobsite encompassed a 16,000 square foot building, it was not possible for leadman Bennett to be overseeing that individual's work all the time. Vay testified that he reported this to Forbes

Forbes testified that he received a phone call from Superintendent Rick Vay, of L. F. Harris & Associates, who complained that someone was just standing around when the foreman would leave. Forbes called Jeff Nelson and told him to find out what was happening. Forbes said that he let Nelson know he was "severely upset" as a phone call like that "breaks down the confidence the client has in my company."

Nelson corroborated this testimony of Forbes. Nelson testified that Forbes contacted him regarding a complaint from a customer. Nelson went to the jobsite and spoke with Rick Vay, superintendent for the general contractor. Vay said that he didn't seem to think Rainbow was getting enough work done out there, and pointed out Power as the painter who was doing nothing when he was not being watched. Nelson talked with Power and he and Metz brought him to the office. They told Power that there had been a complaint and that they needed him to get to work and quit standing around. Power, according to Nelson, was a little upset and defensive and didn't think he had been standing around. At some point prior to that time Power began wearing a union T-shirt.

Power testified that near the end of August 1997, his leadman, Bob Curry, happened to mention the union T-shirt that Power was wearing. Power asked him if he wanted one, and stated that he had given one to Divisional Manager Nelson sometime earlier. As they were leaving work that day, Curry noticed Power's union bumper sticker on his vehicle, and again started talking about the Union. Curry said he didn't think the Union's organizing efforts were going to work, and asked what those 3000 union painters were going to do when all the scaffolding came down in Las Vegas. Curry asked if the Union was paying him to organize. Power did not respond to the question, and just replied that he could get Curry a union bumper sticker and T-shirt if he wanted one.

Power was laid off on September 5, 1997. That morning Curry made the statement to him that "he had never seen work so slow at Rainbow and that if they didn't have all this wallpaper to hang, he didn't know what he'd be doing." Power acknowledged that work was coming to an end on that job. Power worked the entire day, and at the end of the day Nelson brought him his paycheck and said that work might be slow for a little while—from a day or two to 2 weeks, but that he should keep calling in. Power called five to seven times during a 2-week period. On the last occasion, during the latter part of September, Nelson told him to call back in the morning and indicated that he had work for him. However, Power immediately got another job and did not call back.

Nelson testified that Power was laid off on September 5, 1997. He advised Power that he was being laid off due to lack of work as that particular job was just being completed. He also laid off another painter, Jamie Weston, at the same time. About 2 weeks later Nelson tried to call Power back to work by phoning his home and leaving a message on his answering machine that he should report for work the following Tuesday morning. Power didn't show up; rather, he called in on Tuesday morning and said he was busy doing a little job and wanted to know if he could come in on the following day, Wednesday. Nelson said okay, and told him to report to leadman Tory Sheman at the U.S. Foods jobsite on Wednesday morning. Again, Power didn't show up, and the Respondent hired another employee, David Baldovinos, in his place. Weston, who had been laid off at the same time as Power, was also recalled at that time and did report to work on Tuedsay morning.

Nelson testified that, apparently on July 16, 1997, there was a problem with the color of paint that the architect had designated on a particular job and that therefore no painting could be done. Power and Weston were painters on that job. As there was nothing else for them to do, Nelson sent Power and Weston home. However, leadman Bennett remained on the job to try to get the color straightened out.

5. Complaint allegations regarding Brad Larson and Shaun Bennett

Brad Larson, a current employee, began working for the Respondent on July 15, 1997, and has been continuously employed since that date. He has worked on 30 or 40 jobs for the Respondent. He first made his union affiliation known on about October 31, 1997, when the Union notified the Respondent in writing that Larson was a member of the Union's organizing committee. During his safety interview the day after he was hired, Metz asked whether he had ever worked with any union safety officers at Disney World, his previous employer. And then Metz asked if Larson was union or had ever worked with any union people. Larson answered no to all these questions about the union.

On August 26, 1997, Larson overheard a radio conversation between Metz and Bob Curry, the leadman on the job. Metz said the he had been interviewing somebody in the office and asked if Curry knew the individual. Curry said, "Wait till I get to the office, I think he's a union plant." Then Curry turned to Larson and told him that the Union had been trying to get into Rainbow.

On September 2, 1997, Larson was with Curry at the back of Curry's truck in the parking lot. They had been talking about Bill Power. Curry mentioned that as soon as Power had put his union shirt on he had "been sort of laying down on the job." Larson said that he really didn't think so, and that he didn't see any difference in Power's work.

On September 5, 1997, the day Power was laid off, Larson and Curry walked over to the Pizza Hut for lunch. During lunch, in the restaurant, Curry told Larson that "they had gotten rid of Bill [Power] in order to get rid of the union."

On November 3, 1997, Larson was working at the LaQuinta Inn jobsite. He wore a brand new union T-shirt on that day,

and presented a letter to his leadman, Graybeal, announcing his affiliation with the Union. Graybeal remarked, "[O]h, you're one of them . . . that's why it takes so long to hang the wall covering." Later that morning, Curry had arrived with a machine for applying the wallpaper. Larson was helping him unload it. Curry said that Jeff Nelson was really upset that Larson had lied and had said that he was nonunion when he was hired.

After November 3, 1997, when he announced his union affiliation, Larson went to visit employees at their homes, and he talked to employees about the Union every day at work. He also wore a union T-shirt to work every day, and distributed union literature from time to time. His various leadmen saw him engaged in these activities on many occasions.

Nelson testified that Brad Larson was hired to hang wall covering, but that he was also used as a painter. Larson indicated that he supported the Union, and he and Nelson talked about this in a free exchange of ideas. According to Nelson, they discussed the way unions sometimes "come in to businesses and try to stir everything up." During one conversation in September 1997, at the Las Vegas Health Care job, he did tell Larson that as soon as employees put on union shirts they became less productive. Larson agreed and replied, according to Nelson, "[Y]es . . . he's seen some of that and he was going to take care of it."[11]

Larson testified that on November 13, 1997, Nelson was at the jobsite where Larson was working. Two union organizers, John McCafferty and Jaime Contreras, came to the jobsite and Larson introduced them to Nelson. Shortly thereafter, Curry joined the group. Nelson said to Larson that he wanted this conversation to be "off the record" and that he shouldn't be talking to Larson at all. They all shook hands, and proceeded to engage in a lengthy conversation. McCafferty told Nelson that he would like Forbes to sign a union contract. Nelson, while looking at Larson, said that "all those union people are liars," and that "we couldn't trust those union people." He said that a former employee and union organizer, "Jaime Thompson 3 years previously had come to Rainbow lying also" about being nonunion when he was hired. Then Nelson repeated, some 2 hours into the conversation, that union people couldn't be trusted. Larson testified that the conversation lasted "for quite a few hours . . . it was just a long debate," and that Nelson was presenting the negative points and Union Representative McCafferty was presenting the positive points of the Union. Larson just got tired and left while the others were still talking.[12]

Nelson testified as follows regarding the foregoing conversation. At a jobsite, Larson introduced Nelson to Union Organizers Jamie Contraras and John McCafferty. The four of them talked mostly about "union stuff," and the union representatives attempted to recruit Nelson. They told him that if he signed up with the Union they would make sure that he would get union pension credit for the 10 years he had been with Rainbow. Nelson told them that he was not interested, as he was happy working for Rainbow. Nelson testified that during this conversation he did not tell either Larson or the union representatives that people had lied to get jobs with Rainbow. Rather, he testified that, "I told them that they lied to get places, to get to people. They lied to non Union members to try to coerce them to—to try to get them in to joining." Larson testified that he was referring to the fact that the Union would lie to the workers by misrepresenting the Union's pension program, and by telling the workers that they would always be provided work through the union hiring hall.

Union Organizer McCafferty also testified regarding this conversation. He testified that he offered, on behalf of the Union, to furnish the Respondent with skilled union labor to get the job done for them, as the Union had a lot of people looking for work. After a period of discussion, according to McCafferty, Nelson "started hinting to me that all union guys were liars. That when James Thompson and others that applied there, they had not told the company that they were union," and had lied to gain employment with the Company. During the course of this 3-hour conversation Nelson said that "Rainbow would not trust the union because they had been lied to. That Rainbow would never go union." Then, Nelson said that Larson, who was standing there, and Bill Power and Larry Cline "had more or less laid down on the job and were worthless and didn't want to work anymore."

Nelson testified that he was continually transferring employees "all over the place," and that he transferred Larson off of the Steinberg job in January 1998, as it was shut down due to cold weather. Larson, who had been hanging wall covering at the Steinberg job for 2 or 3 days, was transferred to the Tom Siatta Dodge job, where he was assigned painting duties. There was some overtime on the Tom Siatta job, and Nelson, who approves overtime, was asked by the leadman on that job, Graybeal, whether his crew could work overtime on a Saturday to catch up with the work. Neslon said okay, and instructed Graybeal to "work the main guys who had been out there." Neslon testified that he just needed a couple guys to work overtime who were familiar with the job. Further, according to Nelson, Larson had never asked to work overtime.

On Friday, January 16, 1998, Larson observed that Graybeal was going around to all the other painters on the job asking them to work on Saturday, January 17, 1998. Larson, who had never turned down overtime, was not asked to work on Saturday. On Monday, January 19, 1998, Graybeal "sternly" summoned him from across the room, and Larson came over. Larson sarcastically said that he "apreciated" that Graybeal had not asked him to work the preceding Saturday. Graybeal, who was upset with Larson, said that overtime was voluntary. Larson responded that Graybeal had never asked him if he wanted to volunteer. Graybeal said that he was going to get rid of Larson and that he "left too many holidays in the ceiling of the bay . . . and said that it took four guys nine hours to completely respray that area." Larson retorted that that didn't make much sense. Graybeal, according to Larson, "continued to rant at me for about 10 minutes." Graybeal said, "Well, if you don't like it just complain to the union," and Larson retorted that he was going to file charges with the NLRB. Later that afternoon, Nelson showed up and came over to talk with Larson. Larson complained that he was having problems with Graybeal, and told Nelson that the Union was not out to hurt the Company and that his work was competent. Nelson, alluding to some other employee, mentioned that as soon as that individual had put his union shirt on "he just doesn't produce anything."

[11] I credit Nelson's account of this conversation.

[12] On November 14, 1997, the Union notified the Respondent in writing that Brad Larson was designated as the chairman of the Union's organizing committtee, and that the following employees were members of the organizing committee: Brad Larson; Federico Arenas, Noe Cervantes, Larry Cline, Daniel Escamilla, Francisco Esparza, Daniel Gonzales, and Eliseo Rodriguez.

In early June 1998, there was an extensive layoff of painters. Larson testified that he believed some 15 painters were laid off. On June 9, 1998, Larson, Shaun Bennett, who, according to Larson, "had been wearing a union shirt off and on," and leadman Curry were the only workers on a job that was about to be completed. Apparently all three workers were laid off on that date. Larson testified, however, that he was off work for several weeks and was not recalled until about June 29, 1998, and that Shaun Bennett, leadman Rick Bennett's son, had not been recalled at all. Moreover, Larson testified that he later learned that a recent hire, whom Larson identified as Gene Harrison,[13] had been laid off for only 4 days, and Mike Kiss, a leadman, was off for only about 5 hours.

Larson testified that in early July1997, his leadman, Bennett, asked him to work overtime one Sunday. Larson testified that almost all the jobs on which he has worked have been under leadman Bob Curry, and that Curry has criticized his work on occasion by calling his attention to "stupid mistakes" that he may have made. He has worked with Graybeal only on two jobs during his employment with the Respondent.

Larson first testified in this proceeding on July 22, 1998. He worked on Thursday, July 23, and Friday, July 24, 1998. On that particular job, according to Larson, there was enough work remaining for "a couple of people" for only about 1 or 2 days. On Sunday, July 26, 1998, he was told by Nelson not to report to work on Monday, as work was slow. However, on Monday, Larson observed that leadmen Bob Curry and Rick Bennett were completing that same job. Then, on Tuesday, July 28, 1998, Larson received what he characterized as a "weird" call from Nelson, who began the conversation by asking, "Why aren't you out looking for work?" He was told to report to work the next morning.

Nelson testified that he laid off Larson on two or three different occasions. The longest of these occasions was in June 1998. There were only a few jobs in progress and they all were in the process of wrapping up; there was simply a lack of work and he had no place to send Larson. Jamie Weston got laid off at the same time, and other workers voluntarily took time off; otherwise, according to Nelson, they too would have been laid off. Larson was recalled about a week and a half or 2 weeks later. Then he was laid off again for a few days, as work was getting slow and two leadmen, Rick Bennett and Bob Curry completed the job on which Larson had been working, after only 1 more day. Then Larson was recalled again. On this occasion, Nelson called Larson's home and Larson happened to answer the phone. Nelson was surprised and said, "I thought you'd be out working." Nelson said that he made this offhand comment because usually he will get an answering machine, as most laid-off employees will go out and attempt to find small jobs until they are recalled. Larson replied that he was sitting there waiting for Nelson to call him back to work.

Nelson testified that he hired various employees who later identified themselves as union adherents and wore union T-shirts: Larry Cline, Eric Keyes, Fred Larson, William Power, and Kevin Ridebach. The fact that they favored the Union did not influence his decision to either lay them off or rehire them, as such matters were dictated by the workload rather than by their union activity.

[13] The Respondent's records show that the only Harrison working for the Respondent at the time was "Francis" Harrison, and that the Respondent as a painter had hired him on February 9, 1998.

Nelson testified that Shaun Bennett was an apprentice painter and apprentice wallpaper employee. Bennett was laid off in about June 1998, together with Larson, and was not immediately recalled because of some disciplinary problems, and, in addition, because he had no driver's license and therefore no transportation; also, his drug test turned out positive. Both Nelson and Metz talked to him about his problems, and at some point tried to call him, but he had moved to two or three different places in succession. Nelson then talked to his father, leadman Rick Bennett, and finally was able to obtain Shaun Bennett's phone number. Nelson called him and asked whether he had obtained a driver's license. Bennett said no, and went on to relate that he had taken another job in a plastics factory, that he was able to walk to work, and that he was happy with the job. Nelson offered him a job with the Respondent on the condition that he have a valid driver's license and transportation, and Bennett replied that he was happy where he was and didn't want to return to work for the Respondent. Shaun Bennett did not testify in this proceeding.

6. Complaint allegations regarding Steve Jensen, Jose Zepeda, and Marcos Zepeda

Since about January 3, 1997, Steve Jensen has been an employee of Contractors and Builders, a manpower firm utilized by the Respondent for temporary employees. He was first sent out to one of the Respondent's jobs on December 12, 1997. He worked at this first job for only 2 days, under Larry Wood, a leadman, when he became ill. He was told to come back when he felt better. He returned to work for the Respondent on January 2, 1998. On about January 12, 1998, Brad Larson, a union organizer asked him, whether he would be willing to wear a union T-shirt beginning Monday, January 19, 1998. Jensen agreed to do so. Shortly after this conversation, according to Jensen, Steve Graybeal, his leadman, approached him on that particular job, whom, according to Jensen, "Always painted 100 percent" of the time. Graybeal asked him what Larson was talking to him about. Jensen replied that Larson had asked him to wear a union T-shirt the following Monday. Graybeal proceeded to say, according to Jensen, "[Y]ou're not going to go for that union stuff, are you?" Jensen said yes, and Graybeal said, ". . . fuck all that, you know, if the company goes union we'll never have any work." Jensen, with a "profound" look on his face, said, "[O]h." Graybeal rolled his eyes, frowned, and walked away.

On January 17, 1998, according to Jensen, his leadman, Wood, and some other employees were discussing the workload. Wood proceeded to say that the employees would not have to worry about layoffs, as they had more work than they could handle, and that, if anything, the Respondent would have to hire more men. Jensen came to work on Monday, January 19, 1998, wearing his union T-shirt, and testified that about six or seven other employees were wearing union T-shirts that day. Also on that day, the Union sent a letter to the Respondent announcing that nine more employees were members of the Union's organizing committee:[14] Steve Jensen, Mike Campbell, Brad Larson, Norm Ogden, Jose Jesus Zepeda, Marcos Zepeda, Don Dufur, Floyd Dobson, and Ricardo Blanque.

[14] Earlier, by letter dated November 14, 1997, the Union notified the Respondent that the following eight employees were a part of the Union's organizing committee: Brad Larson, chairman, Federico Arenas, Noe Cervantes, Larry Cline, Daniel Escamilla, Francisco Esparza, Daniel Gonzales, and Eliseo Rodriguez.

Jensen testified that at the end of the workday on January 19, 1998, Divisional Manager B. J. English approached him and told him he was being laid off because they ran out of work. English told him, "We're sorry man, and hey, I like your work. You're a great finisher and I'm going to request you back in two to three weeks." Jensen said to English that he had been told there was a lot of work, and English replied that this was not correct and that Metz had told him to lay Jensen off. Jose Zepeda, who also wore a union T-shirt that day, was laid off at the same time, and was told that the Respondent just didn't have any work and that work was slow. Jensen called the Respondent on several occasions, but was not called to work by Rainbow until May 1998; however, during the interim period he continued working fairly steadily for Contractors and Builders. In May 1998, English phoned him and left a message with his roommate that he was being offered a job. However, Jensen was unable to accept the job as he was leaving for Florida.

Jose Zepeda was interviewed by Metz and hired on about November 6, 1997. On January 19, 1998, at about noon, he was approached by two union organizers who showed him a letter listing his name as a union adherent, and told him that they were going to send the letter to the Respondent's office. Zepeda testified that he didn't know what this was about. When he went back to work after lunch Divisional Manager English told him that work was slow and that he and others were being laid off. Zepeda testified that the job he was on, Tom Siatta Dodge, appeared to be coming to an end and that he was not aware of any other jobs that were going on at the time. Zepeda did not wear a union T-shirt on that day, and, the record does not show that prior to that day he was a union adherent. He was recalled on April 2, 1998, and was given a pay increase from $17 to $18 per hour. He worked for the Respondent for 2 weeks, and then he left voluntarily to go to a prevailing wage job.

Marcos Zepeda, Jose Zepeda's brother, worked for the Respondent from November 19, 1997, through January 19, 1998. His leadman was B. J. English. On January 19, 1998, he apparently began wearing a union T-shirt, but it was not visible as he wore it under his sweatshirt. Also, as noted above, on that date the Union sent a letter to the Respondent listing Marcos Zepeda's name as being on the organizing committee. At about 12:45 p.m. on that day, English handed him a layoff slip, and said he was sorry, but that there was no more work for him, and that English was bringing in somebody else to finish the job he had been doing. He gave Zepeda two checks: one for the last week of work, and one for the day of January 19, 1998. English told Zepeda that they were only going to be keeping the three most senior people, one of who was Norm Ogden, who also was listed as a union committee member in the Union's January 19, 1998 organizing letter. Zepeda's brother, Jose Zepeda, was also laid off at the same time. English said there would probably be some work in 2 weeks, and that he would call Zepeda. Zepeda testified that, in fact, he was not called back and that his brother, who was called back, supra, never advised him that the Respondent had attempted to recall him to work.

English testified that in early January 1998, there were as many as 15 tapers on various jobs, but that all of the major jobs were at the completion stage. He began a series of layoffs beginning on January 12, 1998, when he laid off three employees.[15] The next week, on January 19, 1998, he laid off three more employees, namely, Jensen, Jose Zepeda, and Marcos Zepeda. And on January 27, 1998, he laid off Donald Dufur and Floyd Dodson.

English testified that layoffs are necessary when the Respondent runs out of sufficient work to keep the employees busy, and that the persons with the most skills stay the longest. This would be his core group. Thus, he would be most likely to retain an individual with a variety of skills, for example, someone who was good at patchwork, matching textures, and painting, so that the individual could handle any work that might become available. And when a job is winding down, he attempts to leave the leadmen on the job until completion, as they are most familiar with the work. Further, he calls people back from layoff according to their versatility. English testified that at about the end of January 1998, he was left with only his core group of drywall tapers, namely, Norm Ogden, Jim Tolley, Larry Woods, and Bill Keene. According to English, Ogden and Keene clearly identified themselves as union adherents. There was a down period thereafter, before he began recalling tapers.

English testified that after Jose Zepeda and his brother, Marcos Zepeda, were laid off he recalled Jose Zapata and advised told him to notify his brother, Marcos, that he too was being recalled. However, Jose Zepeda told him that his brother was working. It is English's practice not to call back someone who is currently employed because English cannot insure them work for any length of time. Jose Zepeda did come back to work, but worked for only a few days and then left to take a prevailing wage job with another employer. English told him to call back when he was available to again work for the Respondent.

7. Complaint allegations regarding Noe Cervantes and Daniel Escamilla

Noe Cervantes and Daniel Escamilla were hired on November 1, 1997, as drywall hangers. At the time they submitted their employment applications they told Metz and Divisional Manager Montoya, who interviewed them, that they would be late to work each Monday as they had to sign in at the union hiring hall for work on that day. This was apparently acceptable with Montoya and Metz, and they were hired. They attended a union meeting at Freedom Park on November 13, 1997, and began wearing union T-shirts at work. They were listed as members of the Union's organizing committee in the Union's November 14, 1997 letter to the Respondent. Both were laid off on November 21, 1997. According to the testimony of Cervantes,[16] Montoya told both him and Escamilla that they were good workers but that work was slow and that he could not keep them on. Further, Montoya told them that he would call them back to work in 15 days. Cervantes believes that although the job they were then working on was completed, there was a lot of work to be done at other jobsites at the time they were laid off.

Armondo Montoya is divisional manager for the drywall hanging division. Montoya testified that three employees, Noe Cervantes, Daniel Escamilla, and Daniel Gonzalez were interviewed and hired at the same time. Each of the three was wearing a union T-shirt at the time of the interview and one was also

[15] Also, the Respondent's records show that employee Rosalio Valles was laid off on January 13, 1998, and that Daniel Guimond was laid off on January 22, 1998.

[16] Escamilla did not testify in this proceeding

wearing a union hat. They asked for permission to sign up for work at the union hall on Mondays at 8 o'clock. This was acceptable. Montoya testified that it is his decision to determine when employees should be laid off. Cervantes was laid off because of lack of work, as the job he was working on had ended and there were no other jobs beginning right away. While Montoya did not specifically testify about Escamilla's layoff, apparently because Escamilla was not called as a witness by the General Counsel, it is clear from the testimony of Cervantes that Escamilla was also laid off at the same time for the same reason. Montoya testified that he did call back Daniel Gonzales and Daniel Escamilla on March 25, 1998, and attempted to recall Cervantes at about the same time, but no one answered the phone number that Montoya was given for Cervantes.

The November 14, 1997 letter from the Union lists eight employees as members of the union organizing committee. Six of them are drywall tapers under the supervision of Divisional Manager Montoya: Noe Cervantes, Daniel Escamilla, Daniel Gonzalez, Federico Arenas, Francisco Esparza, and Eliseo Rodriguez. On November 21, according to the Respondent's records, Montoya laid off Cervantes and Escamilla, and, in addition, Francisco Chavez, who was not named in the Union's letter and, insofar as the record evidence shows, was not known to be a union adherent. Further, Gonzalez, an announced union adherent who was hired along with Cervantes and Escamilla, was not laid off until January 13, 1998, and there is no complaint allegation that his layoff was discriminatory. And Eliseo Rodriguez, an announced union adherent, has never been laid off.

8. Complaint allegation regarding surveillance by Montoya

Union Organizer Jose Gutierrez testified that he was at Freedom Park on the evening of November 13, 1997, preparing for a meeting with Rainbow employees. With him were two other union organizers, Lori Ashton and Chris Sylvester. Guiterrez testified that he observed two Hispanic individuals conversing under a tree, and went to speak with them. One of them introduced himself as Armondo Montoya, and said he was "Rainbow's foreman." Guiterrez asked him what he was doing there and "if he was trying to help us organize and he was interested in joining the union." Montoya said, according to Gutierrez, "No. I'm here just to observe, to see what happens and see who comes here." Then according to Gutierrez, Montoya noticed two employees approaching and said, "I'd better get out of here, if not these people are going to go back, and the others will not come." Gutierrez asked him "why" and whether it was because he was a foreman, and Montoya said yes and that "he didn't want to scare the guys." Then Guiterrez returned to the two other organizers, and told them that Armando Montoya, Rainbow's foreman, was there. Then Lori Ashton went over and spoke with Montoya "for about a minute."[17]

Employee Noe Cervantes testified that he attended the meeting in the park. The meeting was to begin at 5 p.m., and he arrived late, at about 5:15 p.m. During the meeting he observed that Montoya's truck, a white truck with a rainbow on the door, drove slowly by about 100 feet from where the group was standing.

Union Representative Chris Sylvester testified that he has been to Freedom Park four or five times to meet with employees. He went to such a meeting in November 1997, with two other organizers, Lori Ashton and Jose Gutierrez. About 45 minutes prior to the time the meeting was to begin, he observed two individuals standing about 60 to 70 feet away. Union Representatives Ashton and Guiterrez went over and spoke with them. Then one of the individuals, whom Ashton identified to Sylvester as Montoya, left in his truck. Thereafter the three union representatives held a meeting with some 8 or 10 individuals, and Sylvester observed that Montoya returned and drove back through the parking lot, very slowly due to the congested traffic, and passed close to where the group was assembled as they were meeting alongside the curb of the parking lot. According to Sylvester, there would only have been about one car length separating the group from Montoya's slowly moving truck. Sylvester testified that after the truck left the first time, two people who seemed reluctant to approach while Montoya was standing there earlier, returned to the area for the meeting.

Armando Montoya, divisional manager for the drywall division, testified that on occasion he would be present when employees would talk about the Union's organizing efforts, but that he did not ask any employees how they felt about the Union. On one occasion, in about November or December 1997, employee Nicolas Martinez asked him if he wanted to attend a union meeting at Freedom Park. Montoya said, "Sure, why not."[18] He drove to the park in his truck, parked, and then began talking with Martinez, who was the only Rainbow employee present at the time; however, he noticed that there were about four or five other people standing near an ice chest about 50 feet away. Two union organizers, a woman and a man, approached as Montoya was getting ready to leave. Nicolas Martinez introduced Montoya to them, and they said, according to Montoya, "Why don't you join us over here." Montoya said that "[w]ell, we'll just wait here a little while," and the two said, "Okay, whatever you want, just join us here."[19] Then, as it was cold, Montoya told them that he was leaving. One of the organizers asked why he was leaving, and Montoya said because it was cold and windy and dark, and he was hungry and tired, and there was no one else there. They spoke in Spanish. Montoya testified that after his conversation with the union representatives he went straight home and did not return to Freedom Park later that evening.

Montoya testified that when the employees first told him about the meeting he did advise his supervisor, Howard Samson, that there was going to be a union meeting at the park. However, he was not instructed to go to the meeting by anyone, and did not tell any superiors that that he was going. Nor did he report to anyone what happened there.

9. Complaint allegation regarding mass applicants

The Respondent's business is subject to the customary peaks and valleys of the construction industry, and the employee complement needed to perform the available work is dependent upon the Respondent's daily and weekly schedule. This results in frequent layoffs and transferring employees from job to job. Customarily those retained or least likely to be laid off are the employee's with the greatest seniority and skills for performing the available work. Primarily the Respondent obtains employ-

[17] Ashton did not testify in this proceeding.

[18] Union Organizer McCafferty, when asked whether the lead people were a target of organizing, testified, "I don't really know per say [sic], who the lead people are, anybody at the company was a target of organizing."

[19] Gutierrez, on rebuttal, denied that he or Ashton said this to Montoya.

ees through the process of rehiring laid-off or former workers. This method of hiring is given the highest priority as the employees rehired have already demonstrated their skills, and the Respondent is familiar with their abilities and what may be expected from them. Next, the Respondent hires through referrals, because the referred employee is, in effect, recommended by someone who is known to the Respondent; referrals may be made by anyone known to the Respondent, namely, Respondent's owner, managers, divisional managers, leadmen, employees, or even customers. Lastly, employees are hired through a call-in procedure, the lowest priority, because such employees are unknown quantities. In addition, when it is not practical to go through the hiring process to obtain a worker who may only be needed for a relatively brief period of time, the Respondent utilizes the services of a temporary employment service, named Builders and Contractors.

Currently, when hiring referrals and call-ins, the Respondent utilizes an index card system. Prior to about May 1997, when the Union began its organizing efforts, employees would come to the Respondent's office and fill out an employment application. However, this procedure was changed after the Union began targeting the Respondent. Thus, union applicants, some armed with video cameras, appeared at the Respondent's office en masse and disrupted the orderly work of the office staff. Thereafter, the Respondent posted a notice outside its office that required all applicants to phone in between the hours of 8:30 and 10:30 a.m., Monday through Thursday, and leave their name, phone number, and primary job skill. Initially, the office secretary who answered the phone entered this information in a three-ring binder. The binder was in use until about the end of 1997, and was then discarded because the binder pages, each containing information from about five applicants, became confusing and unwieldy. An index card file system, with a separate card for each applicant, was substituted. Applicants were told that their names would be kept on file for 90 days, after which they should phone again.

Carla Day testified that she worked for the Respondent from December 1996 until November 1997. She was a receptionist. Day testified that in April or May 1997, the hiring procedure was changed from permitting walk-ins to fill out applications to the foregoing three-ring binder telephone procedure. The change was made, according to Day, after some 40 or 50 "screaming and hollering" union applicants entered the Respondent's lobby with video cameras. It created a chaotic situation and disrupted the work of the office, which could not accommodate the large group. Day testified that twice a month union applicants would "ring the phones off the hook," and that, pursuant to instructions from Metz, when union applicants would phone in and announce that they were from the Union she did not note this information on the call-in sheets or anywhere else. Rather, she only entered the name, the phone number, the years of experience, and the trade of each applicant. When an employee needed to be hired, Metz would ask for the three-ring binder,[20] which was utilized while Day was employed, and would call people in the order they had phoned in. On occasion he would instruct Day to call people to come in for an interview, and Day would begin calling employees in the order they had phoned in. This procedure was utilized during the time of her employment, and she followed it without exception. When applicants would ask, she advised them that the Respondent was a nonunion company. There was never an occasion when she was told by Metz or anyone else that she didn't have to take any more names, or that she told any applicant that Rainbow didn't hire union people, or that she had been instructed to tell applicants that business was slow and they just were not hiring at the time.

Joanna Hammonds is Carla Day's successor, and is a current employee of the Respondent. She is an administrative assistant and began working for the Respondent on November 17, 1997. Hammonds testified that she accepts phone calls from people calling in looking for work Monday through Thursday, between 8:30 and 10:30 a.m. She asks their name, their phone number, their primary trade, and their years of experience, and enters only this information on the index card. She explains that the divisional manager will call them in the event they may be requested to come in for an interview, and that their name will be kept on file for 90 days, after which it is their responsibility to call back and update the information. Hammonds testified that in about the second or third week of December 1997, she received a lot of phone calls from applicants who identified themselves as union members and said they were calling from the union hall. She told each of them the same thing, as set forth above. She would tell the Spanish-speaking applicants that that she couldn't help them.

Hammonds testified that initially she used a three-ring binder, separated into the different trades, to enter the applicants' information. She maintained the binder at her workstation, so that if Metz or the divisional managers needed it, they knew where it was. They would come to her and obtain the binder when they needed to hire people in the field. The three-ring binder is no longer in use, and was eliminated because it was very confusing, unorganized, and complicated. At the end of the year she and Metz decided to do away with it, and to replace it with an index card file box. And if a person's name was still active in the binder, she transferred that information onto an index card, after which she discarded the three-ring binder sheets. Hammonds testified that she strictly adhered to the procedure of taking down and recording the foregoing information from each phone-in applicant, and that at no time did she neglect to record such information on the index cards.[21]

Reuben Walker is in charge of estimating and sales for the Respondent. Walker testified that he would take information from some of the Spanish-speaking call-in applicants, and tell Carla Day, in English, what to enter in the binder. According to Walker, this happened on about five different occasions. He is "fairly sure" that on these occasions when he assisted Day with Spanish-speaking applicants, none of the applicants said they were affiliated with the Union.

According to Forbes, the hiring system was devised so that the Respondent would be hiring blind, and "we wouldn't be accused of all the things we're being accused of." There is nothing on the index cards, nor was there ever anything on the predecessor three-ring binder sheets, which were discarded after the Respondent commenced its index card system, that would indicate an applicant's union affiliation or lack thereof.

Union Organizer John McCafferty testified that he conducted the Respondent's mass application program, whereby he solic-

[20] The index card system was not utilized until after Day had left the Respondent's employ.

[21] Metz testified that he believed the Respondent might have declined to accept calls from call-in applicants during Christmas week, 1997.

ited union members who were unsuccessfully seeking employment through the Union's hiring hall by announcing to them over the Union's PA system that "we will be doing mass applications today" and to meet him at the back of the union hall if they were interested. Then he instructed those interested individuals to meet him at the Painter's union hall, some distance away. There he explained the mass application procedure, and wrote a script on the grease board that they were to follow in applying for work, and the phone number that they were to dial.[22] They were instructed to specifically state that they were from the Union. McCafferty testified that this scenario was repeated on four occasions: October 15, November 3 and 19, and December 8, 1997. During each of these sessions, according to McCafferty, there were between 6 and 15 callers, and 2 would call simultaneously, on different phone lines.

McCafferty was not asked, and did not testify, that he instructed the applicants to maintain a record of any phone calls they received from employers or to so notify the Union that they had been contacted. Rather, insofar as the record shows, McCafferty simply told them that if they were hired they should notify him as soon as possible and that they would be expected to help organize the Company before or after work or at breaktime. This is all he told them.

As an investigative tool, the Regional Office prepared questionnaires for the applicants to fill out verifying that they were legitimately seeking work on the day they called the Respondent. The questionnaires, entitled "Questionnaire Regarding Alleged Refusal to Hire," were apparently distributed to the applicants in late March and early April 1998. The questionnaires state that a charge has been filed on behalf of the individual "alleging that the Employer named above has failed to hire you, or consider you for hire because of your membership in a labor organization." However, the questionnaire does not contain the name of any so-called "Employer named above," but rather is blank.

McCafferty was asked how the Regional Office knew whom to contact regarding these questionnaires, and answered that "I think I got the list from the Board [apparently, the Regional Office]" and that he distributed the questionnaires "to each individual I could find." He does not know what happened to this list. Asked how the Board got the list of names, and whether the Regional Office had been given the sign-in sheets that the members had filed out at each mass calling session, McCafferty testified, "I don't know honestly." Nor did McCafferty ever compare and verify the accuracy of list that had been given to him by the Regional Office with the sign in sheets that the members had signed. McCafferty was then asked the following:

> Q. (By Respondent's counsel): So, as you sit here today you don't know whether or not everyone who participated [in the mass calling sessions] completed either a questionnaire or at your request was either sent [a questionnaire] or brought down to the Board for an affidavit?
>
> A. No, I wouldn't know that.
>
> Q. So, it may have been people who made calls that didn't get [sic] affidavits or complete a questionnaire, is that accurate?
>
> A. Yes.

McCafferty testified that he did not assist the members in filing out their questionnaires, and that each member apparently had an independent recollection of the date that he or she called and of the script, written on the chalkboard at the union hall, that he or she was to follow in applying for work with the Respondent. McCafferty testified that it took him about 3 weeks to distribute the questionnaires to everyone, and that there were "forty to fifty" questionnaires returned to the Board. According to McCafferty, some of the applicants may have called more than once if they happened to be at the union hall when McCafferty was soliciting for mass applicants. Further, regarding the sign-in sheets, McCafferty testified that he simply set out a sign-in sheet on the end of the table in the room, and at some early point asked everyone to sign it. However, he did not verify that they did, in fact sign it, and did not remind people at the end of the session that they should sign it if they had not already done so. Further, at each of the four sessions there may have been times when the instruction to sign in was given before some of the people "trickled in." McCafferty testified that he did not "endeavor to keep in touch with the individuals who made phone calls," but would only "see them when they came in to pay dues and stuff, but otherwise, not really, no." It was conceded at the hearing that some of the mass applicants did not sign the sign-in sheet.

Three of the mass applicants, Michael Dunham, Carol Kelley, and Hector Sabino, testified that as they were calling the Respondent on one phone line, other applicants were calling the Respondent at the same time on different telephones;[23] and they further testified that when they reached the Respondent and announced that they were a union member seeking employment, they were told that there was no work at the time and that the Respondent was not accepting any phone applicants. The affidavit of mass applicant Donald Henry McInnis states that he phoned on about November 3, 1997, and, after being told to call back in about 10 minutes, he did so and was told by someone named "Carla" that "things were slow" and that he should call back in a couple of weeks to see if anything has changed. Thus, he never left his name and number. Then, in late November 1997, he called and applied for work but did not state that he was from the Union. The man who answered the phone said that the Respondent was not hiring at this time, and, again, he was not asked to leave his name or number.

Jeff Vaughn is a general representative/organizer for the International Union. Vaughn conducted the fifth mass application session on about February 25, 1998, and testified that each applicant stated that he or she was a union member. Vaughn testified that he conducted this mass application at the time because one of his members, Terry McComsey, reported to him that shortly before that date he had applied by phone to the Respondent and had been told by his wife, who received that call, that the Respondent had offered McComsey a job a day or two after he had applied. Regarding McComsey's telephone application to the Respondent, Vaughn agreed that it was possible that McComsey identified himself as a union member when he called. That, according to Vaughn, is how the Union

[22] It is clear that the mass application procedure was not exclusively reserved for the Respondent herein, and that applicants would phone several employers during one mass application session. Thus, Carol Kelly, who phoned the Respondent during the mass application of November 3, 1997, testified that the applicants "went down to the organizing office and we made phone calls to a couple of outfits seeing if we could get hired or get an interview or whatever."

[23] Numerous mass applicants acknowledged the fact that there was simultaneous calling on different telephones.

assumed that the Respondent was in a hiring mode, and why Vaughn decided to conduct a mass application on February 25, 1998.

Vaughn testified that he did not have the individuals sign a sign-in sheet that day, but specifically recollected, after reviewing his affidavit on various occasions prior to his testimony, the names of the five members who were present and called the Respondent seeking employment. While Vaughn testified that the members filled out statements immediately after they called the Respondent on the phone, it turns out that Vaughn was mistaken, and that the only time these individuals documented that they had phoned the Respondent was pursuant to the aforementioned questionnaires later furnished to Vaughn in late March or early April by Union Representative Chris Sylvester, so that Vaughn could distribute them to the applicants.

Regarding certain discrepancies between the sign-in sheets and the names listed in the complaint herein, the following colloquy took place:

> GENERAL COUNSEL: There are some names that are on the sign in sheets that are not in our complaint. And I'm going to represent to the Court that the reason those three were not included is, to the best of my recollection, that we looked at them and found there was a lack of a prima facia [sic] case as to those three.
>
> JUDGE WACKNOV: Can you explain what you mean by that?
>
> GENERAL COUNSEL: Yes, the, one of the prima facia [sic] elements is that they were ready and willing to accept work. And my recollection is that the reason those three are excluded is because they represented, at some point in the investigation, that they were not so prepared, they were not willing.
>
> JUDGE WACKNOV: Well, that doesn't make a lot of sense because they were allowed to submit their name and then they had 90 days that they were on a list. So, they had no idea when they were going to be called. When—
>
> GENERAL COUNSEL: No, I'm saying is at the point that I, and again, this is a foggy recollection, but what I'm saying to the Court is that at some point in the process it was determined that these three individuals most likely did not warrant inclusion in the case because they represented to us, to the Agency, or to the Union and it was related to us, and again I'm not certain of any of the specifics of any one person but this is my best recollection, that they did not have the necessary elements and therefore, we did not include them.
>
> JUDGE WACKNOV: But [the Respondent] is going to say the reason that they're not included in the complaint is because they were called.
>
> GENERAL COUNSEL: Oh, I mean, if [the Respondent] can prove that then—
>
> JUDGE WACKNOV: Well, I don't know if [the Respondent] needs to prove it, I mean, I think there's a [sic] inference there that can be drawn.

Lee Mullis, divisional manager for the framing division, testified that between the dates of July 1, 1997, and July 31, 1998, a 13-month period, he hired a total of 20 new employees (excluding rehires), and of this number 7 were referrals and 13 were call-ins. Mullis testified that upon hiring individuals he would inquire about their past work experience. Some employees would volunteer that they were or had been union members, and others would name union contractors or union jobs on which they had worked. Mullis testified that their prior union affiliation made no difference regarding his decision to hire them.

Armondo Montoya, divisional manager for the drywall hanger division, testified that between the dates of July 1, 1997, and July 31, 1998, a 13-month period, he hired a total of eight employees (excluding rehires), and of this number, four were referrals and four were call-ins. Montoya testified that three of the people he and Metz interviewed and hired in November 1997, wore union T-shirts at the interview, namely, Daniel Escamila, Noe Cervantes, and Daniel Gonzales. Further, during the interview they asked permission to take time off to go to the union hall and sign up for work every Monday. They were granted such permission, and they were hired. On occasion they were laid off, and then rehired.

Billy Joe English, divisional manager for the taping division, testified that between the dates of July 1, 1997, and July 31, 1998, a 13-month period, he hired a total of 15 employees (excluding rehires), and of this number 10 were referrals and 5 were call-ins. English testified that he knew that employees Norm Ogden and Don Dufur were union when he hired them: Ogden was a former employee, and English testified that he knew that Ogden had gone with the union when he left the Respondent the first time; and Dufer, during his interview, said that he had been working in Reno for a union employer.

Jeff Nelson, divisional manager for the painting and wall-covering division, testified that between the dates of July 1, 1997, and July 31, 1998, a 13-month period, he hired a total of 14 employees (excluding rehires), and of this number, 4 were referrals and 10 were call-ins. Usually he phones the call-in applicant who first phoned in, and then proceeds in chronological order until he reaches a viable applicant who is willing to come in for an interview.

For the acoustical ceiling division between the dates of July 1, 1997, and July 31, 1998, a 13-month period, the Respondent's records show that the Respondent hired a total of six employees (excluding rehires), and of this number, two were referrals and four were call-ins.

Personnel Manager Metz testified that the number of call-ins varies from month to month, and that in January 1998, the Respondent received a total of approximately 70 call-ins: about 50 from individuals seeking work as painters, and about 20 seeking work in all the other divisions. One call-in painter was hired on December 31, 1997, and only two call-in painters were hired in January 1998. And in February 1998, about 31 painters called in and two were hired.[24] Metz testified that merely getting in touch with call-in applicants in order to get them to come in for an interview is a process that usually involves making a number of phone calls: thus, phones have been disconnected, applicants have moved or are working elsewhere, or they simply do not call back.

Metz testified that the divisional managers would let him know what skills they were looking for. If an employee was needed immediately, he would call the applicant who had called in last, as the most current applicants would most likely be available. Otherwise, he would start from the back of the

[24] The record indicates that after it initiated the index card system the Respondent discarded the out-of-date cards (that is, the cards of applicants who had applied more than 90 days prior thereto), and did not begin retaining the out-of-date cards until March 1998; these cards have been furnished to the General Counsel pursuant to a subpoena request.

index card section for the particular skills needed, and would work forward.

Metz testified that the Respondent began using the services of Builders and Contractors during the summer of 1997. There is no record evidence that the Respondent's decision to begin using this temporary employment service was related to the Union's organizational activity. Pursuant to a summary prepared by the General Counsel regarding the Respondent's use of temporary personnel from Contractors and Builders, the summary shows that from July 13, 1997, through February 1, 1998, a 7-month period, the Respondent has utilized some 17 different employees for a total of approximately 1660 hours.

C. Analysis and Conclusions

1. The status of leadmen

It is admitted that the divisional managers are supervisors within the meaning of the Act. It is alleged in the complaint, and denied by the Respondent, that the leadmen are supervisors within the meaning of the Act and "agents of the Respondent, acting on its behalf, within the meaning of Section 2(13) of the Act."

I conclude that the leadmen are not supervisors, as abundant record evidence discloses that they neither possess nor exercise any supervisory responsibilities. However, it seems clear that the other employees could readily perceive that the leadmen who directed their work also had supervisory authority over them. Thus, upon being hired they were simply told to report to a particular leadman in charge of the job, and were never advised of the extent of the leadmen's authority. They were not specifically made aware and therefore would be in no position to know that the leadmen did not effectively recommend wage increases for them, or that the leadmen did not determine or recommend whether or when they should either be transferred to other jobs or laid off, or to what extent the leadmen participated in recommending discipline for them should they not perform satisfactorily.

Further, it was clear to the employees that during the great part of each workday the leadmen were the sole representatives of the Respondent at the work site, and were responsible for insuring that the work was performed according to the Respondent's standards; and, that they possessed and exercised the authority to criticize the employees' work performance when they deemed it to be unsatisfactory. Accordingly, under the circumstances, I find that the workers could reasonably conclude that the leadmen were acting on behalf of and were therefore agents of the Respondent, and that the statements and actions of the leadmen reflected the policies of the Respondent. See *Great American Products*, 312 NLRB 962, 963 (1993), and cases cited therein.

2. Forbes' speech to the employees

Regarding the July 29, 1997 speech by Forbes to the assembled employees, it is alleged in the complaint that Forbes informed the employees that it would be futile for them to select the Union as their bargaining representative, and, in addition, threatened the employees that the Respondent would refuse to sign a collective-bargaining agreement if they did so.

The speech delivered by Forbes was introduced into evidence, and the testimony of various witnesses for the General Counsel corroborate that Forbes did not, in any material respect, go beyond what is written in the prepared text. Forbes simply stated that the Respondent has always been a nonunion employer, that the customers he has established over a 20-year period expected him to remain nonunion, and that therefore he would not become a union employer. At the same time, he told his employees that they were free to engage in union activity and that he intended to obey the National Labor Relations Act and any other pertinent labor regulations. A fair interpretation of his remarks is that Forbes conveyed to the employees the idea that he intended to do whatever he could to remain a nonunion employer within the lawful parameters of the Act. Forbes' expression of these two juxtaposed thoughts certainly seems to be within the permissible boundaries of Section 8(c) of the Act.

Employee Brad Larson was the only witness who testified that Forbes mentioned anything about a union contract. According to Larson, Forbes stated that he had been in business for 20 years and was not union "and he really didn't see any reason that he should deal with the unions or sign a contract." This testimony is not corroborated by any other witnesses, and, assuming arguendo that Forbes made such a statement, this is not tantamount to a threat that Respondent would refuse to sign a collective-bargaining agreement if the employees selected the Union as their collective-bargaining representative.

Nor, do I find that the Respondent's overall conduct, set forth below, would reasonably tend to negate Forbes' statement regarding the Respondent's intention to comply with the provisions of the Act. Accordingly, I shall dismiss these allegations of the complaint.

3. Complaint allegations regarding Larry Cline

I find that on April 23, 1997, Kirk Metz, during his employment interview of Larry Cline, asked Cline if he was in the union or had ever been in the union. Even though Metz went on to tell Cline that "it was okay that he [Metz] had past . . . employees that was in the union and that they had union painters on their jobs," I find that such interrogation was coercive as Cline was put in the position of having to respond to a question that would tend to reveal his union sympathies. Metz did not deny that he so questioned Cline. I find that by such conduct the Respondent has violated Section 8(a)(1) of the Act, as alleged.

I find that on June 24, 1997, Graybeal, a leadman,[25] asked Cline if he had ever been in the union before, and that Cline could have reasonably expected that Graybeal would report an affirmative answer to management. I find that by such interrogation the Respondent has violated Section 8(a)(1) of the Act, as alleged. Clearly, however, the subsequent conversation between Cline and Graybeal on that date was noncoercive in nature.

I find that on July 3, 1997, Graybeal told Cline that the Union was going to picket the LaQuinta job. Cline asked how he knew and Graybeal answered that there was a snitch in the Union. Cline asked who the snitch was and Graybeal said it was Bill Power. I find that by such comments Graybeal created the impression that the Respondent, through an informant, was obtaining information about the Union's activities, and that this would certainly have an inhibiting effect upon the employees' decision to ally themselves with the Union. By such conduct the Respondent has violated Section 8(a)(1) of the Act as alleged.

[25] Each of the leadmen alleged to be agents or supervisors herein testified only to the limited issue of their supervisory authority, and did not deny statements they were alleged to have made to employees.

I do not find that Graybeal's statement to Cline on July 28, 1997, was impermissible. It appears that Graybeal observed that Cline, during working time, was speaking with an employee who had earlier been discharged and should not have been on the premises. Therefore, I find that Graybeal's "no talking" statement was simply an effort to discourage a conversation between Cline and an unauthorized individual who had come on the jobsite. Moreover, Cline testified that he did not discontinue talking with other employees on the job. I shall dismiss this allegation of the complaint.

I find that on the morning of July 29, 1997, Graybeal's "no talking" directive to Cline and other workers was occasioned by Graybeal's antipathy to the Union. Thus, Graybeal had recently learned that Cline and others were on the Union's organizing committee, and, insofar as the record shows, there was no legitimate reason to abruptly change a work rule that, up to that point, had permitted talking among employees during work. By such conduct I find that the Respondent has violated Section 8(a)(1) of the Act as alleged.

I do not find that the questions posed to Cline by Graybeal and Nelson on or about August 14, 1997, was violative of the Act. Cline was by that time an active and open union adherent, and had picketed the Respondent's jobsite that very day at lunchtime, prior to his conversations with Graybeal and Nelson. The questions asked by Graybeal and Nelson, who simply wanted to know what Cline and, it may be implied, the other union advocates wanted, amounted to no more than permissible inquiries regarding what the employees, through union representation, hoped to accomplish. Cline responded by stating that he wanted more benefits and more pay, and that "it was nothing personal." Nelson simply expressed his reservations about union representation, and believed the Respondent took care of its employees by providing work and that there would always be work for Cline, and, further, that Rainbow had an employee who was 63 years old who was doing just fine. Cline could not recall anything more that was said except for "idle chatter."

The foregoing questions to Cline and the ensuing conversation seem to be no more than a permissible attempt to initiate discussion, pro and con, about the Union with a known union activist. No promises were made or implied, and Nelson's remark that there would always be work for Cline, in addition to demonstrating that the Respondent harbored no animus toward him, may be readily understood as an opinion by Nelson that the Respondent consistently provided work opportunities for all of its employees. I find that such a statement was not, as the General Counsel maintains, a specific promise of benefit to Cline in order to induce him to cause him to refrain from union organizational activity. I shall therefore dismiss these allegations of the complaint.

During his tenure, Cline, an active union advocate, was laid off at least once and was moved around to various jobs under different leadmen, including Graybeal, Bob Curry, Rick Bennett, and Tom Beasley. There is no evidence that, other than Graybeal, any of the leadmen or supervisors made any unlawful comments to him or otherwise discriminated against him as a result of his union activity, and he worked steadily until his employment voluntarily ended on or about December 3, 1997.

When Cline quit by walking off the job in the middle of the day he was deemed to have quit without notice and the Respondent noted on an internal "Termination Notice" that Cline was ineligible for rehire. It is the position of the General Counsel that the Respondent's designation of Cline as being ineligible for rehire was discriminatorily motivated, as the Respondent's records show that another employee, Paul Hardgrove, had a poor employment record and, in fact, was terminated by the Respondent on January 8, 1998; and further, while designated as not eligible for rehire Hardgrove was, in fact, rehired on June 5, 1998, some 5 months later. Although their circumstances are certainly different, the Respondent was consistent in designating both Cline and Hardgrove as being ineligible for rehire, and the record shows that during a 13-month period some 16 other employees were deemed to also be ineligible for rehire for similar reasons. However, the distinction is that Hardgrove reapplied; Cline did not. Therefore, the Respondent was never put in the position of having to reassess its determination of Cline's ineligibility. I shall dismiss this allegation of the complaint.

4. Complaint allegations regarding William Power

Power testified that on May 6, 1977, during a breaktime conversation, Beesley, a leadman, told Power that his "buddy, Kevin [Reidebach]" was from the Union, and that from time to time the Union would send people out to the Company and that, "we know how to deal with that." Then there ensued a discussion regarding the Union's tactics in paying employee-organizers to organize the workers. While Beesley is deceased and was therefore unable to deny or explain the alleged conversation with Power, nevertheless I credit the testimony of Power in this regard. Telling Power, who had not yet identified himself as a union activist, that his "buddy" was from the Union implies that Power too was deemed by Beesley to be sympathetic toward the Union. I therefore find that by such a statement the Respondent has violated Section 8(a)(1) of the Act as alleged. While Beesely's related statement that "we know how to deal with that," could be reasonably interpreted as a nonthreatening remark, it could also be understood to mean that the Respondent may take some sort of unspecified action against "Kevin" because of his union activities. As it appears that, in context, the latter interpretation is the most reasonable under the circumstances, I find that this statement constituted an implied threat to deal adversely with union adherents, and is violative of Section 8(a)(1) of the Act. However, I do not find the other portions of the conversation, related by Power, to be violative of the Act. Rather, this seemingly friendly discussion of the tactics that a union may employ in organizing employees contained no elements of interference, restraint, or coercion.

On July 11, 1997, Power wore a union T-shirt to work, and gave a letter to his leadman, Rick Bennett, announcing that he was organizing on behalf of the Union. During his tenure with the Respondent, Power had been moved around from job to job quite a bit. And while he testified that during the 3-1/2-month period prior to the end of June he had worked 68 hours of overtime, in fact the Respondent's records show that he had worked only a total of 29.5 hours of overtime. And, from about the end of June until July 11, 1997, when he identified himself as a union adherent, and thereafter up until the time he was laid off on September 5, 1997, according to Power, he only worked 1-1/2 hours of overtime. As far as he knew, other employees were not working overtime during this period; further, Power testified that he was on "a couple of jobs that I closed up for sure," and that there probably was not any need for overtime on those jobs. I find that, under the circumstances, the General Counsel has not demonstrated that Power was denied overtime because of his identification as a union activist and the leader of the Union's organizing committee. Indeed, Power testified that

about 2 weeks after he identified himself as a union organizer he was invited by Divisional Manager Nelson to join Nelson and a leadman for lunch, and there is no record evidence that this luncheon invitation was designed for an improper purpose.

Regarding the incident of July 16, 1997, I credit the testimony of Nelson and find that he sent home two painters, Power and Weston, because there was an unresolved problem with the color of paint that was to be applied, and that the leadman remained on the job. Both Power and Weston were recalled to work after 1 day. I find that the 1-day hiatus in Power's employment was the result of legitimate business considerations and was not discriminatorily motivated. I shall dismiss this allegation of the complaint.

It is interesting that the criticism of Power's work performance began shortly after the Union as the leader of the Union's organizing committee identified Power. While the General Counsel takes the position that this cause-and-effect relationship is evidence of discriminatory conduct toward Power, the clear, abundant and credible record evidence shows that for some unexplained reason Power's work performance did indeed suffer after his union leadership role was announced. I find that Bennett's criticism of Power for not painting the tops of the pipes and for leaving "holidays" was reasonable and nondiscriminatory, and I credit the related testimony of Vay, Forbes, Nelson, and Metz regarding Power's apparent slacking off on the job at the same time. I shall dismiss this allegation of the complaint.

The General Counsel maintains that, for discriminatory reasons, Power was purposefully not given the proper tools to perform certain painting work in order to "set him up" for criticism by Bennett, his leadman. I credit Nelson's testimony regarding the matter and find that Power, as a journeyman painter, should have been able to properly adjust his equipment so that he would be able to compensate for not being provided with the correct size of spray nozzle which, at the time, was not readily available. The fact that the most efficient spray nozzle may not have been provided to Power at the time, without more, does not warrant the conclusion that the Respondent intentionally failed to provide Power with the proper tools. I find it highly unlikely that Bennett, knowing that the painting would have to be redone or at least touched up, would intentionally deny Power the proper equipment hoping that he would do a poor job of painting for which he could be criticized. I shall dismiss this allegation of the complaint.

I find that all the criticism of Power's unsatisfactory work performance was warranted, and that the Respondent's July 25, 1997 admonition to Power regarding his work performance was moderate and nonconfrontational, and was simply designed to ascertain whether he had any problems and to encourage him to apply himself to the work he was assigned. There were no further similar incidents, and Power's work for the Respondent was apparently deemed to be satisfactory until the time he was laid off on September 5, 1997.

I find that the conversation near the end of August 1997, between Power and his leadman, Curry, was simply a friendly exchange regarding the pros and cons of union representation. Indeed, during the conversation Power offered Curry a union T-shirt and bumper sticker, and said that he had already given a T-shirt to Divisional Manager Nelson. In this context, Curry asked Power, the announced leader of the Union's organizing committee, whether he was being paid by the Union to organize, a recognized practice. Power was evasive and did not answer the question, and Curry did not pursue the matter. I believe that Power could have readily understood that this was a spontaneous question, and did not constitute a conscious attempt by Curry to obtain improper information. Thus, I find nothing in this conversation to constitute interference, restraint, or coercion toward Power for his union activities, and shall dismiss the allegations of the complaint pertaining to this conversation.

I credit Nelson's testimony and find that on September 5, 1997, he laid off Power and another painter, Jamie Weston, at the same time. There is no contention herein that Weston was a union advocate or that his layoff was similarly unlawful. Further, it is admitted by Power that work on the job was in the final completion stage. Nelson then, I find, attempted to call both Weston and Power back to work about 2 weeks later, as Nelson had initially said that he would do. Weston showed up on the appointed day while Power did not, and Nelson granted Power's request that he be permitted to begin work on the following day, but Power failed to do so.[26]

I am mindful of the fact that on that very day, during a lunchtime conversation, Curry told Larson that "they had gotten rid of Bill [Power] in order to get rid of the union." While this statement, undenied by Curry, is clearly unlawful, infra, nevertheless it was Nelson, not Curry, who made the decision to lay off Power, and I credit Nelson's testimony that the September 5, 1997 layoff of Power and Weston was for lack of work. Moreover, contrary to Curry's statement, the Respondent did not "get rid" of Power; rather, Nelson attempted to recall Power some 2 weeks later. I find that the surrounding circumstances, including Nelson's attempt to recall Power to work, and the finding herein that the Respondent did not discriminate against other union activists, supports the Respondent's position that the layoff of Power was not discriminatorily motivated. I shall dismiss this allegation of the complaint.

5. Complaint allegations regarding Brad Larson; failure to timely recall Shawn Benett

Metz did not deny that the day after Larson was hired, during a safety interview, he asked Larson whether he had worked with any union safety officers at Disney World, Larson's prior employer, and then asked if Larson was union or had ever worked with any union people. Larson answered no to these questions. Even though Larson had already been hired, I nevertheless find that Metz' interrogation of Larson regarding his prior union affiliation was unlawful. By such conduct the Respondent has violated Section 8(a)(1) of the Act as alleged.

On August 26, 1997, Larson overheard a radio conversation between Metz and Bob Curry, the leadman on the job. Metz said that he had been interviewing somebody in the office and asked if Curry knew the individual. Curry said, "Wait till I get to the office, I think he's a union plant." Then Curry turned to Larson and told him that the Union had been trying to get into Rainbow. I credit Larson's testimony and find that Curry's response to Metz, in the presence of Larson, could have reasonably caused Larson to believe, whether correctly or incorrectly, that an applicant's union activity was a factor to be con-

[26] Nelson appeared to have a clear recollection of the events surrounding the layoff and recall of Power and Nelson, and although the Respondent's records show that Power was laid off and do not show a similar layoff of Weston, nevertheless Nelson's account of the incident was not challenged at the hearing.

sidered in the hiring process. By such a statement, I find that the Respondent has violated Section 8(a)(1) of the Act.

On September 2, 1997, Curry told Larson that after Power had put his union shirt on he had "been sort of laying down on the job." Larson disagreed, and said that he didn't see any difference in Power's work. I do not find that this statement to Larson was unlawful, particularly as I have found that Power, an active and open union advocate at that time, had in fact been deficient in his work performance after he announced his leadership role in the Union's organizing efforts. I shall dismiss this allegation of the complaint.

On September 5, 1997, Larson and Curry walked over to the Pizza Hut for lunch. During lunch, in the restaurant, Curry told Larson that "they had gotten rid of Bill [Power] in order to get rid of the union." Telling an employee that another employee has been discharged in order to get rid of the Union, whether or not the statement is merely a supposition or is intended to inhibit the union activity of others, is violative of Section 8(a)(1) of the Act, I so find.

I find that Graybeal's November 3, 1997 derogatory statement to Larson that, "that's why it takes so long to hang the wall covering," on the day Larson announced his union affiliation and first wore a union T-shirt, is violative of Section 8(a)(1) of the Act as alleged. This statement clearly conveyed the idea that Graybeal equated deficient workmanship with union activity, and that union advocates would be presumed to be poor workers. There is no evidence that, in fact, Larson's work was other than satisfactory.

Also on November 3, 1997, Curry told Larson that Jeff Nelson was really upset that Larson had lied and had said that he was nonunion when he was hired. Expressing dissatisfaction with an employee for failing to acknowledge union sympathies implies that the employee may be subject to unspecified reprisals or treatment and is clearly coercive. I find that this statement is violative of Section 8(a)(1) of the Act as alleged.

Similarly, I find that Nelson's November 13, 1997 statement to union representatives, in the presence of Larson, that "all those union people are liars," is violative of Section 8(a)(1) of the Act. In this regard, it was reasonable for Larson to assume, particularly after his earlier conversation with Curry, that Nelson was intimating that Larson was a liar for failing to acknowledge his union affiliation during the hiring process. In this context, being told that a supervisor harbors such negative feelings about an employee is coercive, as it causes the employee to fear that his employment relationship may somehow be affected.

I credit Nelson and find that Larson had been recently transferred to the Tom Siatta Dodge jobsite from a different job, and that Nelson had instructed Graybeal to give overtime work on Saturday, January 17, 1998, to a couple of the "main guys who had been out there" prior to Larson's transfer to the job, and who were therefore familiar with the work to be done. I shall therefore dismiss the compliant allegation that Larson was denied overtime work on that day for discriminatory reasons.

During the January 19, 1998 conversation between Graybeal and Larson, Graybeal berated Larson for not properly spray painting an area. Graybeal told Larson that he was going to get rid of him, and further told him that if he didn't like it he could complain to the Union. That afternoon, when Nelson showed up on the job, Larson complained to Nelson about Graybeal's tirade, and said that the Union was not out to hurt the company and that his work was competent. It seems clear that Graybeal, by stating that Larson could complain to the Union about Graybeal's criticism of him, was implying that he believed Larson's alleged poor workmanship and his union affiliation were interconnected. Larson denies that his work was deficient. There is no evidence, and the Respondent has not maintained, that Larson had intentionally failed to perform the work in a satisfactory manner.[27] Whether or not Graybeal's criticism of Larson was warranted, I find Graybeal's threat to discharge Larson was coercive and violative of Section 8(a)(1) of the Act as alleged because Graybeal implied that Larson's alleged poor work performance was related to his union activity.

In early June 1998, only three individuals, Larson, Shaun Bennett, who is leadman Rick Bennett's son, and Curry, the leadman, were working on a particular job. It appears that all three were laid off. Apparently, according to Larson's testimony, all of the Respondent's complement of 15 painters was also laid off at about the same time. There is no allegation that this particular layoff of Larson and Shaun Bennett, who from time to time would also wear a union T-shirt, was discriminatory. However, it is alleged that all of the other painters were recalled earlier, and that the recall of Larson and Shaun Bennett was delayed for discriminatory reasons. Larson testified that other painters were recalled that same week: he was told that one of the new hires, Gene Harrison, had only 4 days off; and Mike Kiss, a leadman, was off for only about 5 hours. However, Larson's layoff lasted some 3 weeks, and Shaun Bennett's layoff lasted some 6 weeks, until about July 24, 1998.

I am mindful of statements by leadman Graybeal, as related by to leadman Kiss that "[w]e're gonna fuck with [Larson] until he gets laid off," and that a week or so later after Larson was, in fact, laid off, Graybeal told Kiss, "We finally got rid of that union mother fucker." Abundant record evidence shows that Graybeal was an outspoken, temperamental individual, who had a tendency to "yell and holler" about many things, and who was particularly critical of the Union and of all union adherents. Graybeal had nothing to do with Larson's layoffs, and there is no record evidence that he was privy to management's discussions of union matters. Further, Graybeal made a similar statement to Kiss about Cline, and told him that, "if Larry Cline don't quit, we're gonna find a reason to get rid of him." Yet Cline, an openly active union adherent, worked steadily for the Respondent, without incident, from April 23, 1997, until December 3, 1997, when he walked off the job. I conclude that Graybeal's aforementioned statements regarding Power, under the circumstances, are not probative of the Respondent's motivation for Larson's various layoffs.

Nelson testified that he laid off Larson on two or three different occasions. The longest of these occasions was in June 1998. According to Nelson, there were only a few jobs going on at the time and they all were in the process of wrapping up; there was simply a lack of work. He had no place to send Larson. James Weston got laid off at the same time, and other workers, including three leadmen, Rick Bennett, Bob Curry, and Ray Nibley, voluntarily took time off; otherwise, according to Nelson, they too would have been laid off. The Respondent's records show that Larson was laid off from June 9, 1998, and was recalled on June 29, 1998; thus, he was off work a total of 13 workdays. Weston, according to the Respondent's records,

[27] Larson, who acknowledged making certain "stupid mistakes," admits that his work was sometimes criticized by Curry; however there are no complaint allegations regarding such criticism.

was laid off on June 11, 1998, and was not recalled until July 16, 1998, a total of 24 workdays.

The record evidence of this particular mass layoff in June 1998 and the Respondent's sequence of recalling workers thereafter are particularly unclear. It appears that Shaun Bennett, the son of leadman Rick Bennett, was clearly not one of the union leaders, yet Shaun Bennett was recalled much later than Larson, one of the announced leaders of the union movement. Further, it appears that James Weston, who, according to the Respondent's records, was hired some 2 weeks earlier than Larson, and was not a union adherent, was recalled after Larson and just a few days prior to Shaun Bennett's recall. Moreover, I credit Nelson and find that Shaun Bennett's recall was delayed because of transportation and drug-related problems, and not because of his occasional wearing of a union T-shirt.

In addition, the record does not disclose that the Respondent had a policy or any particular method of recalling employees from layoff in any sequence of seniority. Employees were recalled, it appears, according to their versatility and skills need to perform the available work. Thus, the General Counsel's assertion that Larson should have been recalled prior to, perhaps, the recall of less senior employee Harrison, who had been employed by the Respondent for some 4 months prior to the layoff, is not supported by probative record evidence. Finally, I credit the assertions of Nelson to the effect that he did not predicate any employment decisions on the basis of whether or not particular employees supported the Union. Assuming, arguendo, that the General Counsel has presented a prima facie case regarding the Respondent's failure to recall Larson and Shaun Bennett in timely fashion, I conclude that the Respondent has met its *Wright Line*[28] burden of demonstrating that the Respondent's recall of Larson and Shaun Bennett from layoff was not discriminatory. I shall therefore dismiss these allegations of the complaint.

It is alleged that the Respondent denied Larson work on Monday, July 27, and perhaps on Tuesday, July 28, 1998, both because of his union activity and in retaliation for his earlier testimony in this proceeding on July 22, 1998; and, further, that Nelson threatened Larson during the July 28, 1998 phone call.[29]

Nelson testified that he again laid off Larson for a few days, apparently on July 27 and 28, 1998, as work was getting slow. It was the Respondent's practice to give preference to leadmen when work opportunities were limited, and two leadmen, Rick Bennett and Bob Curry completed the job on which Larson had been working, after only one more day. Then, on the next day, Nelson recalled Larson to work. Thus, Nelson phoned Larson's home and, to Nelson's surprise, Larson happened to answer the phone. Nelson began the conversation by stating, "I thought you'd be out working." Nelson testified that this was simply an offhand, spontaneous comment, and that it was not intended, as the complaint alleges, to have any sinister connotations. I credit Nelson's testimony. I find that Larson was laid off because the remaining limited amount of work could be completed by the two leadmen. I further find that during the telephone conversation, Nelson's statement to Larson was innocuous and nonthreatening. I shall dismiss these allegations of the complaint.

6. Complaint allegations regarding Steve Jensen, Jose Zepeda, and Marcos Zepeda

Since about January 3, 1997, Steve Jensen has been an employee of Contractors and Builders, a manpower firm utilized by the Respondent for temporary employees. He was first sent out to one of the Respondent's jobs on December 12, 1997. On or about January 12, 1998, shortly after engaging in a conversation with Brad Larson, Graybeal, his leadman, who asked what Larson had said to him, approached Jensen. Jensen replied that Larson had asked him to wear a union T-shirt the following Monday, January 19, 1998, and Graybeal proceeded to say, according to Jensen, "[Y]ou're not going to go for that union stuff, are you?" Jensen said yes, and Graybeal said, ". . . fuck all that, you know, if the company goes union we'll never have any work."

I credit the testimony of Jensen and find that Graybeal interrogated him regarding his conversation with Larson, a known union activist, and then asked Jensen, in effect, whether he too intended to engage in union activity. I find that by such conduct, the Respondent engaged in surveillance of employees' union activity, and interrogated Jensen regarding his union sympathies. Such conduct is violative of Section 8(a)(1) of the Act as alleged. However, I do not find Graybeal's statement that, "if the company goes union we'll never have any work," to be violative of the Act. Clearly, this is merely a statement of opinion by Graybeal that he believed the Respondent's customers would go elsewhere if the Respondent became unionized. I shall dismiss this allegation of the complaint.

Regarding the January 19, 1998 layoffs of Jensen, Jose Zepeda, and Marcos Zepeda, I credit the testimony of Divisional Manager English and find that these three employees were laid off as part of a much larger layoff of the Respondent's drywall tapers at a time when several large projects were being completed. During this period there was some juggling of employees so that some tapers may have been laid off and other, more senior or qualified tapers, may have finished up the jobs of the laid-off employees, as it is English's practice to retain his leadmen or core employees if possible. Further, English had laid off three other tapers about a week earlier, and, a week later, on January 27, 1998, laid off two additional tapers, Donald Dufur and Floyd Dodson. The layoff of these latter two individuals, who were also listed as members of the Union's organizing committee in the Union's January 19, 1998 letter to the Respondent, is not alleged in the complaint as being unlawful. Moreover, English retained his core group of employees, one of which, Norm Ogden was also listed in the Union's letter as a member of the organizing committee. Then, I find, English attempted to recall Jensen, Jose Zepeda, and Marcos Zepeda when work picked up and the Respondent again needed their services.

It clearly appears that the Union's January 19, 1998 letter, in which it identifies a number of drywall tapers as union organizing committee members, was purposefully designed to prevent the layoffs that the Union anticipated and/or or to substantiate a later claim that such anticipated layoffs were unlawful. I find that the January 19, 1998 letter did not, as maintained by the General Counsel, cause the Respondent to immediately and precipitously discharge announced union adherents because

[28] *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983).

[29] The complaint alleges that by such conduct, namely, Nelson's phone call for the purpose of recalling Larson to work, the Respondent, "Threatened employees who had testified at an NLRB hearing by informing them that they should seek alternative employment."

they were named in the letter; rather, the layoff of tapers began a week prior to the date of the letter. I find that the Respondent has sustained its burden of proof under *Wright Line*, supra, and I shall therefore dismiss the allegations of the complaint pertaining to the alleged unlawful layoffs of Jensen, Jose Zepeda, and Marcos Zepeda.

7. Compalint allegations regarding the layoffs of Noe Cervantes and Daniel Escamilla

I credit the testimony of Divisional Manager Montoya and find that he laid off Noe Cervantes and Daniel Escamilla on November 21, 1997, because of lack of work and not, as alleged in the complaint, because they had announced their affiliation with the Union. Indeed, they were known to be active union members when they were hired. Further, the Respondent's records show that another employee, who was re-hired on November 5, 1997, and was not, insofar as the record shows, a union adherent, was also laid off on the same day as Cervantes and Escamilla, while Gonzalez, who was an announced union committee member and was hired along with Cervantes and Escamilla, was retained, as were other announced union committee members. Assuming arguendo that the General Counsel has presented a prima facie case regarding the layoff of Cervantes and Escamilla, I conclude that the Respondent has sustained its burden under *Wright Line*, supra, of demonstrating that the layoff of these two individuals was not unlawful. I shall dismiss these allegations of the complaint.

8. Complaint allegation regarding surveillance by Montoya

I credit the testimony of Divisional Manager Montoya and find that he was invited to the union meeting at Freedom Park by an employee, and was not told by higher management to go to the park for purposes of surveillance. I further credit his testimony that while at the park he was invited by the union organizers, who were aware of his supervisory capacity, to remain at the park and attend the meeting. He was never asked to leave the area. Rather, he simply left of his own volition. Therefore, I find that his presence at the park did not amount to surveillance as alleged, and I shall dismiss this allegation of the complaint.

I find, however, that as Union Representative Sylvester and employee Cervantes testified, someone in a Rainbow truck proceeded to drive through the parking lot thereafter, and could observe the individuals who were assembled. Montoya was not the only supervisor who knew about the meeting, as he had earlier reported to his superior that there was to be a meeting at the park. Further, it appears reasonable to presume that Montoya's truck was identical to other Rainbow trucks, and that it was more than a mere coincidence that another Rainbow truck would be passing through the parking lot of the park during the time of the scheduled union meeting. Regardless of whether Montoya or some other supervisor was driving the truck, I conclude that by such conduct the Respondent attempted to engage in surveillance of its employees' union activity, and by such conduct has violated Section 8(a)(1) of the Act as alleged.

9. Complaint allegations regarding mass applicants

The complaint alleges that since on or about October 15, November 3 and 15, and December 8, 1997, and February 25, 1998 (the dates of the mass calling sessions), the Respondent "has failed and refused to consider for employment and has failed and refused to employ" 36-named individuals.

At least four of the mass applicants were not permitted to leave their names and numbers with the Respondent when they called. There is abundant evidence that the applicants would often be calling the Respondent at the same time on two or more different phone lines, and I find that it was perfectly understandable, under the circumstances, that the person who answered the Respondent's phone would request that callers call back or would advise them that the Respondent was simply not taking any more calls at the time. Under the circumstances, I find that the Respondent's refusal to take pertinent information from each applicant at the time he or she called is not violative of the Act. I shall dismiss this allegation of the complaint.

I find that the Respondent's changing of its hiring procedure, under the circumstances, is not, as the General Counsel contends, evidence of an intent to discriminate against union applicants. The evidence shows that the Respondent's hiring procedure was changed because of the Union's attempt to disrupt the work of the office staff by inundating the office with mass applicants at one time. Thus, the Respondent had a legitimate business reason for requiring that thereafter applicants were to call the office within a proscribed time period each day, and leave only certain relevant information so that the Respondent could later contact them. Moreover, I find that, as credibly testified to by Metz and Hammond, changing from the unwieldy notebook entry system, whereby information from some five applicants would be contained on each page, to the more simplified individual index card system for each applicant, was designed for purposes of expediency and is not, as the General Counsel maintains, further evidence of an attempt to discriminate against union applicants.

I credit the testimony of office secretaries Carla Day and Joanna Hammond, and find that they were specifically instructed not to note the telephone applicants' union affiliation and were to enter only relevant information so that the Respondent could contact the individuals when it was in a hiring mode. I further find that they precisely followed this instruction. I credit the testimony of Metz and the various divisional managers who participated in the hiring process, and find that they did not attempt to identify and disregard call in applicants on the basis of suspected union adherence; nor is there any showing that the Respondent circumvented its established call in hiring procedure by hiring, for example, off the street.

It is clear and undisputed that during the relevant period herein the Respondent did, in fact, hire a fair number of call-ins from either the notebook entries (up to about November 1997) and the index card entries thereafter. While the record evidence indicates that the total number of call ins far exceeded the number of union mass applicants, it is reasonable to assume that at least some of the mass applicants would have been among those the Respondent would have attempted to contact when it needed to hire from the call in applicants. Indeed, it is maintained by the Respondent that, as it randomly called applicants and frequently had to phone a number of applicants before reaching an available candidate for the position, it most likely did attempt to contact at least some of the mass applicants.

It appears that the Union's mass application procedure was not designed to accurately verify whether any of the applicants were contacted by the Respondent, or, indeed, to even accurately maintain a record of the identity of the mass applicants. Thus, any individual who was not referred out during the Union's hiring hall procedure was invited to another location to

apply by phone for work with unknown employers, not just the Respondent; and such individuals may or may not have signed the sign-in sheet that was left near the door of the room; and, it is reasonable to assume under the circumstances, that they may or may not have even known, or cared, or recollected the names of the employers they were asked to phone.

Significantly, according to Union Representative McCafferty, the mass applicants were told to report to him as soon as possible only if they were to get hired, at which time McCafferty intended to inform them of their organizing obligations as employees of a nonunion employer. Thus, insofar as the record shows, the mass applicants were not instructed to report to Mccafferty when any employer that they might have phoned had contacted them. Thereafter, McCafferty did not routinely canvass the mass applicants to ascertain whether they had been called by any employer, but rather testified that he might simply so inquire, in passing, when he happened to see them. Finally, McCafferty testified that during the investigative stage of this proceeding there may have been as many as 50 questionnaires of mass applicants who phoned the Respondent during the mass application sessions he conducted.

While the mass applicants may have honestly believed that they did not receive a phone call from Rainbow, such an honest belief is problematical under the circumstances. There are many reasons why such an honest belief may be potentially unreliable: information may not have been relayed by family members to other family members who were currently employed;[30] or the applicant may have received a phone call but, if he or she was working or unavailable for work at that time, did not pay much attention to the identity of the caller; and, as no applicant, insofar as the record shows, was directed to keep a record of such calls, they are simply being asked to rely upon their memories of possible phone calls which, at the time, were of no meaningful significance.

Moreover, the mass applicants were not asked until some months after they applied, whether the Respondent had contacted them. Thus, in the case of the mass applicants who phoned on October 15, 1997, it was not until some 5-1/2 months later (early April 1998) that they were first asked anything about the Respondent by anyone, and then, in completing the investigative questionnaire regarding the matter, it is obvious that they were assisted in their recollection of the events by the Union.

I am mindful of the fact that the Respondent did not keep any records of whom it called during its attempt to hire call-in applicants, and that the mass applicants had no choice but to phone the Respondent and leave their names and phone numbers and primary job skill. Had the Union established a verifiable procedure whereby it diligently explained to the mass applicants that they and their families should keep concurrent and accurate records of each phone call from prospective employers, and had the Union consistently monitored the applicants' compliance with this system of verification, such a process would tend to be significantly more probative than the method it actually employed herein. Here, the Union's instruction to the mass applicants that they should report back to the Union only if they were hired, virtually invites the applicants to simply disregard any phone calls when, for example, they are employed or otherwise unavailable and are therefore not seeking to be hired. On balance, the General Counsel's evidence that none of the mass applicants were called is less probative than the Respondent's evidence that it most likely did call some of the mass applicants.[31]

Finally, I find that the record as a whole does not demonstrate a propensity on the part of the Respondent to discriminate against union activists. Thus, I have dismissed each of the allegations of the complaint pertaining to alleged instances of unlawful layoffs and instances of unlawful failure to rehire. Further, abundant record evidence shows that the Respondent has in fact hired known active union members, and has continuously retained announced union adherents as valued core employees, and, in the case of Power, one of the Union's leaders, even continued to employ him, without incident, after a serious and meritorious complaint was lodged against him by one of the Respondent's customers.

On the basis of the foregoing, assuming arguendo that the General Counsel has established a prima facie case, I find that the Respondent has met its *Wright Line*, supra, burden of proof by demonstrating that it did not discriminatorily fail to call or hire any of the mass applicants. I shall therefore dismiss these allegations of the complaint.[32]

10. Complaint allegations regarding the *Johnnie's Poultry* issue

It is alleged that the Respondent violated the *Johnnie's Poultry*[33] rights of the leadmen who were interviewed by the Respondent during its investigation and preparation for the hearing herein. Respondent's counsel admitted that it interviewed the leadmen and did not assure them of the safeguards set forth in *Johnnie's Poultry*. These leadmen were alleged in the complaint to be supervisors within the meaning of the Act and agents of the Respondent; indeed, they have been found to be agents of the Respondent. In the absence of any citation of authority that an employer is required to give alleged supervisors such assurances, I shall dismiss this allegation of the complaint.

CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.
2. The Union is a labor organization within the meaning of Section 2(5) of the Act.
3. The Respondent has violated Section 8(a)(1) of the Act as set forth herein.
4. The Respondent has not violated Section 8(a)(3) or (4) of the Act as alleged.

[30] For example, I have found that Divisional Manager English attempted to recall Marcos Zepata by calling and advising his brother, Jose Zepata, that both Zepata brothers were being recalled. Jose Zepata did not bother to advise his brother of this call, as his brother was working somewhere else.

[31] As noted above, the names of three mass applicants were omitted from the complaint because it was determined that, for some unspecified reason, they were not seeking work. This explanation does not make sense, as each of the mass applicants, according to Union Representative McCafferty, were, by definition, seeking work; indeed, this is the very reason they applied. And even if they were not seeking work, the issue of whether or not they were contacted by the Respondent would seem to warrant their inclusion in the complaint if, in fact, they had not been contacted. The absence of these individuals from the complaint is therefore perplexing.

[32] The following case relied upon in the General Counsel's brief is inapposite: *D.S.E. Concrete Forms*, 303 NLRB 890, 897 (1991), affd. 21 F.3d 1109 (5yh Cir. 1994).

[33] 146 NLRB 770 (1964).

THE REMEDY

Having found that the Respondent has violated Section 8(a)(1) of the Act, I recommend that it be required to cease and desist therefrom and from in any like or related manner interfering with, restraining, or coercing its employees in the exercise of their rights under Section 7 of the Act. Further, the Respondent shall be required to post an appropriate notice, attached as "Appendix."

On the foregoing findings of fact and conclusions of law, I issue the following recommended[34]

ORDER

The Respondent, John Forbes, a sole proprietorship, d/b/a Rainbow Painting and Decorating, Las Vegas, Nevada, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Interfering with, restraining and coercing its employees in violation of Section 8(a)(1) of the Act by interrogating them regarding their union affiliation or union activities, by engaging in surveillance of their union activities, by telling employees that other employees have been laid off because of their union activities, by threatening to discharge employees because of their union activities, by implying that employees' union activities are considered in the hiring process, by implying that the work of employees will be more closely monitored because they are active on behalf of the Union, and by telling employees that managers are upset with them for failing to reveal their union affiliation during the hiring process.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of rights guaranteed to them under Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the purposes of the Act.

(a) Within 14 days from the date of this Order, post at the Respondent's place of business copies of the attached notice marked "Appendix."[35] Copies of said notice, on forms provided by the Regional Director for Region 28, after being duly signed by Respondent's representative, shall be posted immediately upon receipt thereof, and be maintained by Respondent for 60 days consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that said notices are not altered, defaced, or covered by any other material.

(c) Within 21 days after service by the Region, file with the Regional Director for Region 28, a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

[34] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[35] In the event that the Board's Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted By Order of the National Labor Relations Board" shall be changed to read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."